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Supreme Court, U.S.
FILED
031479 APR 26 2004
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

PHILLIP GALLEGOS, PETITIONER

v.

JICARILLA APACHE NATION, A FEDERALLY RECOGNIZED INDIAN TRIBE; CLAUDIA VIGIL-MUNOZ, STANFORD SALAZAR, TROY VICENTI, TYRON VICENTI, HERBERT MUNIZ, CARSON VICENTI, LESTER ANDRES, AND RONALD JULIAN, AS TRIBAL COUNCIL MEMBERS AND INDIVIDUALLY; HOYT VELARDE, DOREEN VIGIL, LEESON VELARDE, ISAAC ROYSTON, TIMOTHY ANDERSON, ESTEBAN BLANCO, LILLIAN VENENO, AND TINA GOMEZ, AS TRIBAL EMPLOYEES AND INDIVIDUALLY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a tribal forum is *inaccessible* under the second prong of the 10th Circuit's *Dry Creek Lodge* exception when a fired non-Indian tribal police officer is deprived of his right to call witnesses on his behalf and present his own testimony at a tribal administrative hearing guaranteed under tribal law and regulation?

II. Whether a dispute over the firing of a non-Indian tribal police officer constitutes a matter of "internal tribal affairs" under the third prong of the *Dry Creek Lodge* when it promotes, rather than discourages, the continuation of corruption within the tribe's police department?

III. Whether a tribe can accuse a non-Indian employee of criminal behavior constituting federal felonies and fire him when it could not maintain jurisdiction to prosecute him in its own tribal forums for those same alleged crimes under the holding of *Oliphant*?

PARTIES TO THE PROCEEDING

Petitioner Phillip Gallegos, plaintiff-appellant below, is a non-Indian citizen of the United States of America and a resident of Hispanic descent living near the Jicarilla Apache Nation Reservation in Northwestern New Mexico. Mr. Gallegos was employed as a patrol sergeant by the Jicarilla Apache Nation Police Department.

Respondents, defendants-appellees below, are the Jicarilla Apache Nation, a federally recognized Indian tribe, various elected officials of the Nation's Legislative Council and employees of the Nation.

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PETITION FOR WRIT OF CERTIORARI

Phillip Gallegos, Petitioner, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on November 28, 2003.

OPINIONS BELOW

The Tenth Circuit opinion is unpublished and reprinted in the Appendix (App.) hereto at 1a. That opinion affirmed the memorandum opinion and order of the District Court for the District of New Mexico and Judgment entered in this case on November 19, 2002 and reprinted at App. 18a.

JURISDICTION

The judgement of the court of appeals was entered on November 28, 2003. On February 19, 2004, the Honorable Associate Justice Stephen Breyer of the Tenth Circuit Court of Appeals granted petitioner's application for an extension of time within which to file his petition for writ of certiorari, extending the time to April 26, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 10(c), in that the Tenth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court.

RELEVANT PROVISIONS

1. Provisions of the Indian Civil Rights Act ("ICRA"or "Act") of 1968 (25 U.S.C. § 1302), "Constitutional rights", provide in pertinent part:

No Indian tribe in exercising powers of self-government shall: (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

2. Article IV § 2(h), "Rights of Members", Revised Constitution of the Jicarilla Apache Nation (JAN) provides the same protections as 25 U.S.C. § 1302(8).

3. Title 19, Chapter 1, § 5 (a)(b)(c), JAN Tribal Code, governing formal grievances is reprinted at App. 36a - 39a.

INTRODUCTION

This case presents issues of extraordinary national importance to the due process and equal protection rights of thousands of non-Indian tribal employees diligently and sincerely working for tribal governments within the jurisdiction of the Tenth Circuit Court of Appeals. The Tenth Circuit has carved out a narrow exception in *Dry Creek Lodge, Inc. v. United States*, 623 F.2d 682 (1980) to the Court's holding in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), that the ICRA was not to be interpreted as an unequivocal congressional general waiver of tribal

sovereign immunity in federal courts. The *Dry Creek Lodge* exception serves as a distant "beacon light" to those non-Indians caught in a tangle of tribal intrigue and ill-will that prevents them from accessing a tribal forum where they may remedy particularly egregious allegations of personal restraint and deprivation of personal rights by tribes in the Tenth Circuit. However, the Tenth Circuit has abdicated its responsibility to insure that the lower courts correctly apply the *Dry Creek Lodge* exception to factual allegations in actions filed against tribes under the ICRA, thus, making their struggle toward justice impossible.

In *Santa Clara Pueblo v. Martinez*, the Court stated that the substantive rights created by the ICRA must be vindicated through tribal forums which are obliged to apply the Act. *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984). Fired non-Indian tribal employees are compelled to seek relief through tribe's court system or tribal administrative processes. Denial of relief through the tribal forums constitutes a deprivation of the non-Indian employee's right to protect his job and reputation from unjustified attack. A blemish on a tribal employee's employment record affects him both on and off the reservation and severely impacts on his ability to provide for his family's basic needs. Where a fired and "blacklisted" non-Indian law enforcement employee lives on his own property near a remote reservation such as at the JAN in NW New Mexico, extreme hardship is imposed on him and his family when he is forced to find a job in distant areas.

STATEMENT

This case presents a question about what constitutes the proper application of the *Dry Creek* exception to situations where non-Indians allege in the federal courts that their right to due process and equal protection *within tribal forums* were ignored or obstructed by a tribal sovereign to a point where access to the tribal forum is blocked - a half-measure of tribal due process is no measure at all.

At issue here is a dispute thrust upon Phillip Gallegos, a Hispanic JAN police officer, by his termination from tribal employment on October 2, 2000.[1] In instances where a tribal employee is fired from his job, the employee expects that he will be able to appeal his firing through a fair and impartial tribal administrative process giving him a degree of due process. The JAN has an established grievance procedure so that its employees, tribal and non-tribal, can contest their firings. See App. 36a - 39a. When a tribal member is fired for exactly the same reasons as the non-Indian and is subjected simultaneously to precisely the same tribal grievance procedures as the non-Indian, an ICRA equal protections issue arises when the tribal member is reinstated and the tribal

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[1] When fired, Officer Gallegos was denied access to his personal equipment consisting of a Colt Jr., a 45 cal. backup, flashlights, handcuffs, batons, posse box, gloves binoculars, minolta camera and case, file case, roller meter, Torrance P.D. shirt and a polaroid camera valued at $3,092.00. The property was stolen from his "secured" office at the JAN PD station soon after his firing. A.5, ¶ 22.

member is not. A.5, ¶ 42.[2]

Further, this case presents a question about what constitutes a "dispute" falling outside of internal tribal affairs that will satisfy the last prong of the three prong *Dry Creek* test. Even assuming that this Court's decision in *Santa Clara Pueblo v. Martinez* must be strictly adhered to in respect to tribal sovereignty, this case presents questions concerning what constitutes a "narrow tailoring" of the Tenth Circuit's *Dry Creek* judicial exception to achieve that goal. Despite the obvious tension, *Santa Clara Pueblo* and *Dry Creek* are not necessarily inconsistent *if* the lower courts engage in a meaningful review of the ICRA complaint's factual allegations. Respect for the tribe's inherent sovereignty is achieved *if* the lower courts cautiously balance the valuable tribal interest against unnecessary intrusions in its internal affairs against an equally valuable interest of individuals seeking their "day in court" in a tribal forum. Equal respect must be accorded to the non-Indian employee's ability defend against scurrilous, frivolous and wholly unsupported charges that he was fired because he engaged in criminal activity amounting to the commission of federal felonies. A.5, ¶ 22.

Petitioner Gallegos submits that the holdings in the U.S. Supreme Court case of *Martinez v. Santa Clara* and the 10th Circuit Court of Appeals decision in *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes* may be safely reconciled so that the factual allegations

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[2] Citations herein, other than to the App. filed with this petition, are to numbered documents in the Appendix (A) filed by petitioner in the Tenth Circuit.

he set out in his federal civil rights action filed on August 30, 2002 can undergo proper review at both district court and circuit levels. In this regard, Petitioner raises the following questions:

1) Whether a tribal forum is *inaccessible* under the second prong of the 10th Circuit's *Dry Creek Lodge* exception when a fired non-Indian tribal police officer is deprived of his right to call witnesses on his behalf and present his own testimony at a tribal administrative hearing guaranteed under tribal law and regulation?

2) Whether a dispute over the firing of a non-Indian tribal police officer constitutes a matter of "internal tribal affairs" under the third prong of the *Dry Creek Lodge* when it promotes, rather than discourages, the continuation of corruption within the tribe's police department?

3) Whether a tribe can accuse a non-Indian employee of criminal behavior constituting federal felonies and fire him when it could not maintain jurisdiction to prosecute him in its own tribal forums for those same alleged crimes under the holding of *Oliphant*?

I. FACTUAL BACKGROUND

A. Plaintiff - On October 2, 2000, plaintiff Gallegos, a non-tribal member, was served with notice that he had been terminated from employment with the JAN Police Department ("PD") upon allegations that he had violated provisions of the JAN Personnel Policies and Procedures. A.5, ¶ 26. All through his

tribal ordeal, Officer Gallegos has only been able to determine that he was accused by defendant Hoyt Velarde, JAN Executive Director of Public Safety, of embezzling tribal monies, misappropriating tribal funds for the personal gain of his relatives and stealing two (2) sniper riles and AR-15 rifles owned by the JAN PD. *Id.*, ¶ 22.

On October 13, 2000, Gallegos filed a grievance hearing request form seeking any information on why he had been terminated. *Id.*, ¶ 30. The hearing on Officer Gallegos' grievance commenced on March 2, 2001. *Id.*, ¶ 40. Gallegos' hearing was consolidated with the grievance hearing of Alan Tafoya, the ex-Acting Chief of the JAN PD. *Id.* The entire proceeding came to a halt on the morning of Friday, March 3, 2001, when the Tafoya grievance panel ruled that his firing had been executed in violation of the administrative procedures contained in the JAN Personnel Polices & Procedures. *Id.*, ¶ 42. Officer Gallegos' termination was upheld although *his* panel refused to hear his case-in-chief that would have proven that he was fired by management for reporting corruption and wrongdoing within the JAN PD. App. 41a - 42a. In contrast, Alan Tafoya, a member of the JAN, was "reinstated" by his panel on the basis that the "personnel manual was not followed" and on the basis that he had not acted in a "dishonest, neglectful or criminal manner." A.5, ¶ 42; App. 43a.

On March 17, 2001, plaintiff Gallegos formally appealed his Panel's decision to Claudia Vigil-Muniz, President of the Nation's Legislative Council, to uphold his termination without giving him a chance to put on his case-in-chief to prove that his firing was the

result of a conspiracy by defendants to punish and retaliate against him for his "whistleblowing" activities. A.5, ¶ 43. Gallegos exhausted his tribal administrative remedies on March 28, 2002, over a year later, when he received formal notice that the JAN Legislative Council had upheld his firing. *Id.*, ¶ 48. A decision of the Legislative Council in an employment matter is final. It is clear from the record established in the lower court that Officer Gallegos consistently appealed his October 2000 firing because the JAN did not grant him access to the most fundamental part of the grievance proceeding - his right, under tribal administrative regulations, to put on his testimony and call witnesses to testify in his favor. At all points in the course of exhausting tribal forum remedies, Officer Gallegos raised the deprivation of his right to present his own defense yet the JAN refused to even listen to his deprivation of fundamental due process and equal protection argument.

B. Tribal ICRA Policies and Administrative Grievance Practices

1. Tribal ICRA Laws - Art. IV, JANC, § 2(h), "Rights of Members", states that the JAN, in exercising its powers of self-government shall not "[d]eny to *any person within its jurisdiction* the equal protection of its law or deprive any person of liberty or property without due process of law." (Emphasis added.) Any resolution, ordinance or other enactment which, by the terms of the JAN constitution or in conformity with applicable Federal law must be approved by the Secretary of the Interior . . . .". *See* JANC, Art. XI, "Powers of the Tribal [Legislative] Council", § 2.

Undoubtedly, the ICRA is a "law" of the United States of America and the JAN is obligated, pursuant to the terms its own Amended Constitution and Ordinances, to abide by the due process and equal protection provisions of the ICRA engrafted in its governing document. JANC § 19-2-(A)-(3), "Equal Opportunity" states "[t]he [JAN] Government, *in accordance with the applicable provisions of the laws of the United States*, shall not favor or discriminate against any person because of race, color, sex, age, religion, national origin, ancestry, political party affiliation, or handicap. (Emphasis added.)

2. Tribal Administrative Grievance Practices - The JAN administrative grievance procedures accessible to tribal employees is very detailed and provides an understandable step-by-step procedure for handling employment disputes. Despite the existence of tribal regulations mandating the JAN to hear Officer Gallegos' defense, he *never* had an opportunity to present testimony through the statements of witnesses at any grievance and appeal panel hearings. App. 38a.

II. PROCEEDINGS BELOW

A. The District Court - The District Court held that two of the three *Dry Creek* requirements were not met. App. 23a. Gallegos' complaint set out allegations that Gallegos' tribal appeals were directed toward the JAN refused to allow him *full and guaranteed access* to the "tribal forum" so he could present his defense at the March 2001 hearing. Despite the existence of these allegations, Judge William P. Johnson held that a tribal forum was available. App.

23a. Without any discussion on the allegations raised in Gallegos' complaint about rampant pervasive corruption within the JAN PD, Judge Johnson concluded: "Nor can I conclude that what is at heart a wrongful termination action does not concern tribal issues, which would bring the case within the *Dry Creek* exception." *Id.* The District Court's decision fails to discuss the facts plainly alleged in Officer Gallegos' complaint that the grievance panel held a hearing for Alan Tafoya, the tribal member, but stopped short of allowing him to proceed with his defense against the firing. Similarly, the lower court's decision does not offer any meaningful analysis of the facts in *Penobscot Nation v. Fellencer*, 164 F.3d 706 (1st Cir. 1999), *EEOC v. Karuk Tribal Housing Authority*, 260 F.3d 1071 (9th Cir. 2001) or the *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989) in relation to the complaint's factual allegations. The District Court simply lumped three cases together and stood on them where there were no allegations under review in those cases that the Tribe, its officials and employees had conspired to fire anyone to promote and protect corruption within the tribe's police department.

The District Court reasoned that its narrow application of the *Dry Creek* test to Officer Gallegos ICRA complaint would promote the interest of tribal immunity described in *Nero et al. v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1460 n. 5 (10th Cir. 1989).

B. The Court of Appeals - The Tenth Circuit characterized the District Court's opinion as "well-reasoned and thorough". App. 4a. The Circuit Court agreed with the lower court's conclusion that a "tribal forum was available". In affirming the lower court's

finding on the second prong of the *Dry Creek* exception, the Tenth Circuit Panel looked toward *Olguin v. Lucero*, 87 F.3d 401, 404 (10th Cir. 1996), where the plaintiffs had a pending case on the same events and transactions in the tribal court: "The crucial distinction is the plaintiffs in *Dry Creek Lodge* were prevented from even filing a cause of action in tribal court and were instead directed to use "self help", while the appellants currently have a cause of action pending before the tribal court." *Id.* at 7a. Olguin is inapplicable to the clear facts in the record made at District Court level. When Gallegos' counsel asked why he could not put on his defense to his firing when it was his time to do so, he was told by his grievance panel that it had heard enough. Gallegos was not only "severely" limited in his ability to present evidence, he was flat out denied *any* way to have his grievance heard. It cannot be seriously doubted that Officer Gallegos had wholly exhausted his tribal remedies to object to the fact he had been denied a hearing in the tribal forum by the time he filed his federal ICRA civil action in the U.S. District Court, District of New Mexico. Gallegos was permitted by his grievance panel to give his opening statement of what he would prove but nothing more. App. 47a - 51a.

Without any searching analysis of Judge Johnson's "well-reasoned and thorough" opinion, the Panel simply spliced his third prong reasoning into its Order and Judgment. By doing so, the Tenth Circuit Panel missed the key point alleged by Gallegos that his October 2000 firing was the direct result of conspiracy among tribal officials and employees to stop him from divulging to federal authorities proof of pervasive corruption within the JAN PD. Where a tribal police

officer reports evidence that other fellow police officers are committing violations of tribal and federal criminal laws and is fired because of it, the dispute over the firing impacts on tribal matters that are not completely "tribal internal" in nature. Where the tribal forums consistently deny access of tribal remedies or tribal forums affirm the denials of due process and equal protection so corruption in the JAN PD will continue, the dispute becomes one that reaches beyond the confines of the JAN reservation and into an area of federal governmental concern. The Tenth Circuit Panel utterly ignored any meaningful discussion on the "corrupt" nature of the allegations in his ICRA complaint and their bearing on whether this might have pushed the question of federal jurisdiction in favor of Officer Gallegos.

The Circuit Court will not deign to engage in a thorough review of the lower court record where an police officer's job and reputation are at stake but it will quickly jump to punish Officer Gallegos' attorney for the filing of a "frivolous" appeal in an amount around $2,000 more than what was stolen from him by his own "fellow" JAN PD officers right after he was fired in October 2000. A. 12a - 15a; A.5, ¶ 22.

REASONS FOR GRANTING THE WRIT

I. THE QUESTIONS CONCERNING THE TENTH CIRCUIT'S APPLICATION OF THE *DRY CREEK* TEST TO GALLEGOS' ICRA COMPLAINT ARE OF EXTRAORDINARY NATIONAL IMPORTANCE AND SHOULD BE DECIDED BY THE COURT.

In the 1980 case of *Dry Creek Lodge v. Arapahoe and Shoshone Tribes*, supra., the Tenth Circuit established a rule that should provide a jurisdictional basis for Gallegos' claims and a waiver of the JAN's sovereign immunity. *Santa Clara Pueblo v. Martinez*, supra. held that the ICRA was not to be interpreted as an unequivocal congressional general waiver of tribal immunity in federal courts. In order to maintain a federal ICRA action under the *Dry Creek Lodge* exception, a non-Indian plaintiff must allege in his complaint a "particularly egregious allegations of personal restraint and deprivation of personal rights. . ." . *Ramey Const. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 319 (10th Cir. 1982). The language of *Dry Creek Lodge*, at 685, follows:

> It is obvious that the plaintiffs in this appeal have no remedy within the tribal machinery or with the tribal officials in whose election they cannot participate. The record demonstrates that plaintiffs sought a forum within the Tribes to consider the issue. They sought a state remedy and sought a remedy in the

> federal courts. The limitations and restrictions present in *Santa Clara* should not be applied. There has to be a forum where the dispute can be settled.

Dry Creek Lodge creates an exception based on "absolute necessity".

Since 1980, non-Indians and non-tribal entities have clamored to use the *Dry Creek Lodge* exception to seek resolution of their claims against tribes. *See Kenai Oil and Gas, Inc. v. Dept. of Interior*, 522 F. Supp. 521, 529-531 (D. Utah 1981) ("Only where plaintiffs' efforts to obtain a tribal remedy have demonstrated that no such remedy is available will this court take jurisdiction."); *Ramey Const. v. Apache Tribe of the Mescalero Reservation*, supra, at 319, fn. 4 ("That case involved particularly egregious allegations of personal restraint and deprivation of personal rights that are not present in this action."); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1346 (10th Cir. 1982) ("And *Santa Clara Pueblo* (citations omitted), reminds us that a proper respect for tribal sovereignty itself and for the plenary authority of Congress in this area "cautions that we tread lightly in the absence of clear indications of legislative intent [to waive tribal sovereign immunity]"); *White v. Pueblo of San Juan*, supra. at 1313 ("This broad definition of tribal immunity and the Supreme Court's concern for restricting federal intrusions into self-government would be undermined if this court would further limit the immunity applicable to the tribes."); *Enterprise Mgt. Consultants v. U.S. ex rel. Hodel*, 883 F.2d 890, 892 (10th Cir. 1989); *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1460 (10th Cir. 1989) ("We agree that plaintiffs do not fit within

the exception outlined in *Dry Creek Lodge*, an exception this court has narrowly construed."); and *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1170 (10th Cir. 1992) ("The *Dry Creek* exception to sovereign immunity clearly does not apply where a party voluntarily chooses not be pursue its case in tribal court."). However, the Tenth Circuit approach toward affirming lower court dismissals of ICRA actions without a more than a cursory review of the findings below creates an imbalance always favoring tribal sovereign immunity against the ICRA rights of non-Indians on the reservation. There is no need to keep an extremely significant 1980 rule behind closed doors when circumspect cautious application of the rule in this new century is long overdue.

It is exceedingly rare that anyone has succeeded in maintaining an ICRA action by asserting the *Dry Creek Lodge* exception. *Little Horn State Bank v. Crow Tribal Court*, 690 F.Supp. 919, 921-22, a case arising in the 9th Circuit, is one instance where factual allegations were found by a district court sufficient for the maintenance of federal jurisdiction. There, the determining factors related to jurisdiction were 1) the underlying cause of action arose out of a financial transaction that took place outside of the boundaries of the reservation and 2) the record reflected that there were no further adequate tribal remedies available to plaintiff. Chief Judge Battin was not afraid of issuing a scathing condemnation of the tribal forum at issue in *Little Horn State Bank*, at 923, by calling the Crow Tribal Court a "kangaroo court": "While the tribal members enjoy the protections of their rights under both the United States Constitution and the ICRA, depending on the forum, it appears that non-Indians

are not granted the same privilege of dual citizenship in Tribal Court."

On March 20, 2003, the Tenth Circuit affirmed, in *Kennedy v. Hughes*, No. 02-2112 (D. New Mexico), the district court's dismissal of plaintiffs' suit:

> We have held that our holding in *Dry Creek* must be interpreted narrowly to avoid conflict with the Supreme Court's decision in *Santa Clara*. *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984). In order for the *Dry Creek* exception to apply, "[a] plaintiff must demonstrate: the dispute involves a non-Indian party; a tribal forum is not available; and the dispute involves an issue falling outside of internal tribal affairs." *Ordinance 59 Ass'n v. U.S. Dep't of the Interior Sec'y*, 163 F.3d 1150, 1156 (10th Cir. 1998)(footnote omitted.)

A. AVAILABILITY OF A TRIBAL FORUM

The JAN unilaterally cancelled Officer Gallegos' tribal administrative grievance in "mid-stream" and before he was able to testify on his own behalf. The lower courts could not see the glaring due process issue of Gallegos' lack of access to a tribal forum to present a defense against his termination. He could not refute unfounded and false charges that he violated tribal and federal criminal laws. The record below proves that, as of January 30, 2001, the United States Department of the Interior, Bureau of Indian Affairs (BIA), did not have any investigations open on Officer Gallegos for

any reason. A.5 ¶ 57. What the Tenth Circuit Panel has done is to turn a "blind-eye" and a deaf ear to the cries of United States Citizens, like Officer Gallegos, who have undergone the horror of a "kangaroo" tribal grievance proceeding that was nothing more than a "blatantly arbitrary denial of due process." *Little Horn State Bank*, supra. These abuses have "lamed" Officer Gallegos and his family. Yet his cries for justice are branded by an insensitive system of federal justice as "lame efforts". App. 30a.

Where recourse to the most significant part of the tribal remedy is prevented, as in Officer Gallegos' situation, a plaintiff must have access to a federal forum to protect his livelihood and professional reputation. Indeed, where a tribal sovereign engages in actions designed to obstruct a non-Indian employee's ability to protect his tribal employment rights through available tribal forums, recourse to the federal courts is an *absolute necessity*. Otherwise, a deft tribe can successfully thwart a fired non-Indian employee's rights though a series of cunning maneuvers that appear on their face to give the released worker due process but, in reality, offer nothing more than a sham proceeding similar to that condemned in *Little Horn State Bank*. This sort of behavior results in a mockery of every American citizen's fundamental right to due process - a half-share of tribal due process is no due process at all.

In a ruling with profound implications upon the substantive rights of non-Indians, created by the ICRA, to due process and equal protection in tribal forums, the narrow exception or "escape route" provided by *Dry Creek Lodge* must be properly applied

by the federal courts *if* the record sufficiently alleges that a tribe engaged in obstructionist tactics to dodge altogether its ICRA obligations. However, the Tenth Circuit's November 28, 2003 decision against Gallegos held, in effect, that the JAN was free of any ICRA liability whatsoever for its failure to give him the full benefit of a tribal grievance proceeding, thus depriving him of his right to testify on his own behalf and call witnesses. Had Officer Gallegos not been stopped from presenting his case against his firing to his three member grievance panel, he would have proven that his firing was wrongful and the result of conspiracy among fellow JAN police officers to prevent him from reporting to tribal and federal officials about their corrupt and unlawful activities. A.5, ¶¶ 52-53. In so ruling, the circuit court has jeopardized the implementation of the only viable exception or "escape route" from the traditional sovereign immunity bar from suits against Indian tribes in federal courts. In circumstances where a plaintiff properly alleges a type of "egregious" injury at the hands of a callous uncaring tribal government causing loss of his job and reputation, there arises a constitutional deprivation redressable in the federal courts under the ICRA.

B. EXISTENCE OF A "DISPUTE" INVOLVING INTERNAL TRIBAL AFFAIRS".

The Tenth Circuit's ruling in this case comes as a stun to non-Indian employees, like Officer Gallegos, who are powerless to raise issue with corrupted internal tribal procedures that devastate their rights to due process and equal protection accorded to them under the ICRA. A tribal employment "dispute", so

closely related to the alleged efforts by the Tribe, its officials and employees to cover up and promote continued corruption within the JAN PD, cannot arise to the level of a legitimate governmental interest owed any degree of legitimacy or respect under the third prong of the *Dry Creek Lodge* exception. Maintaining corruption within the JAN PD by the firing of an honest police officer reporting the corruption to "outside" federal law enforcement officials can never become a matter that is material or essential to tribal self-government, at least *not* in the United States of America.

As a non-Indian who has chosen law enforcement as his profession, an accusation of criminal behavior that resulted in Gallegos' firing will, in all probability, deprive him of any opportunity to carry a badge and enforce laws off the reservation or on any reservation in the United States. Defendant Hoyt Velarde told a New Mexico law enforcement official that "plaintiff had embezzled tribal monies, misappropriated other funds for the personal gain of relatives of plaintiff, stolen two sniper rifles and several AR-15 rifles belonging to the Nation's Police Department, acts constituting federal felonies." A.5, ¶ 22. This unique array of factors makes the dispute under review here one that is not entirely confined on the JAN reservation. Nor is the promotion of JAN PD internal corruption through Gallegos' firing entirely a matter wholly inside the ambit of "internal tribal matters." This is not a situation where Gallegos is quibbling over the application of state law to a termination from a tribal job he claims is regulated by state law as in *Penobscot*

Nation v. Fellencer, supra.: "When the Nation acts on "internal tribal matters," its actions are not subject to regulations by the state."

Justice Thomas recently stated in his concurring separate opinion, at 8, in *U.S. v. Lara*, 541 U.S. ___ (2004) that" [p]urely "internal" matters are by definition unlikely to implicate any federal policy." Police corruption on the reservation became a matter of outside federal policy and interest when federal officials from the BIA Office of Law Enforcement Services verified the legitimacy of Officer Gallegos' internal investigations that JAN PD officers were engaging in corrupt activities: "It is clear that a federal official, Theodore R. Quasula, investigated reports of internal fraud and corruption and submitted to the federal government by Gallegos and those charges were substantiated." A.5, ¶ 18. Further, the District Court recognized that an element of "outside" interest was evident in Gallegos' ICRA claims: "He reported the misconduct of tribal officials and police officers to the Acting Chief of Police, which then allegedly resulted in a request for investigation by federal law enforcement officials." App. at 31a. The District Court also referred to the possibility of a federal grand jury investigation. *Id.* When the JAN acts on "internal tribal matters" there should be absolutely no presence of "outside" federal officials such as the BIA Office of Law Enforcement Services and Federal Bureau of Investigations into the commission of federal crimes "outside" the jurisdiction of the JAN self-governance

authority to prosecute.

The Gallegos ICRA claims inject entirely new elements into a doctrine that the Tenth Circuit has devalued to a worthless status. *Dry Creek Lodge* was a case decided on a static situation involving access by non-Indians to their land. The Gallegos case cannot be viewed in traditional *Dry Creek Lodge* terms since it clearly involves and implicates matters of concern, tribal police corruption and employment, that are federal in nature and not entirely bounded by the geographic boundaries of the JAN Reservation. *See Haddle v. Garrison*, 119 S. Ct. 498 (1998). In this same way, the "property right" at issue is not merely one entirely bounded by a job on the JAN Reservation. As a certified law enforcement officer, the property right maintained by Gallegos is his ability to apply for and obtain employment in an extremely sensitive area requiring the highest degree of professional and personal honesty, integrity and trustworthiness. In this modern century, with a dramatic increase of non-Indian employees living on tribal reservations or coming daily on to those reservations, the *Dry Creek Lodge* exception must be accessible to Gallegos and others in his situation, allowed to evolve and not suffer condemnation behind closed doors for the sake of allowing the JAN to dodge its ICRA obligations.

Significantly, Officer Gallegos cannot vote in tribal elections to effect changes to any aspect of a tribal government gone "wild". In such a powerless and weakened position, it is extremely important for the Tenth Circuit to recognize that non-Indian employees like Gallegos must be able to protect their

right to continued tribal employment in the federal courts by invoking the narrow *Dry Creek Lodge* exception. This must be the course taken when "rogue" JAN police officers and JAN employees intended to deprive Officer Gallegos and the JAN administrative process went only "half-way" with its ICRA due process guarantees.

The key issue is whether any legitimate tribal interest is served when JAN is allowed to obstruct Officer Gallegos' right to a fair hearing and then hide behind *Santa Clara Pueblo v. Martinez* to evade federal court review for its calculated failure to give him any measure of due process in the tribal forum. The Tenth Circuit's decision contravenes its own 1980 precedent that it put in place as a safeguard against the whimsey and callous maliciousness of tribes toward non-Indian land owners trying to access their property to promote their business interest. There is no reason why hardworking and dedicated non-Indian employees should be denied access to the *Dry Creek Lodge* exception so they may also protect their "property rights" to their employment. Employees in the same shoes as Gallegos, enforcing tribal and federal laws on reservations in "Indian Country" in the 10th Circuit, will never report internal corruption within tribal police departments if they know they can be fired and denied meaningful due process and equal protection at their tribal grievance hearings. Errant and corrupt tribal officials and employees, embolden by dismissal of cases like that filed by Officer Gallegos, will be given free license to terrorize their non-Indian employees with

wrongful terminations knowing that, by "tweaking" the internal tribal procedures, egregious violations of non-Indians' ICRA rights will never see the light of day in the federal courts.

This case is not about Gallegos' "dissatisfaction" with the tribal grievance panel's decision to uphold his firing: it is about the decision of the panel to prohibit him from presenting his case-in-chief as guaranteed under the JAN Tribal Code. Accordingly, this Court should grant the petition and reaffirm the sanctity of those substantive rights ICRA guaranteed by the Act to non-Indians who are powerless to correct misaligned tribal forum procedures except through the Tenth Circuit's own *Dry Creek Lodge* exception.

II. THE TENTH CIRCUIT DECISION CREATES A BAD RULE REGARDING THE DISTRICT COURT'S DUTY TO REVIEW THE ALLEGATIONS IN A FEDERAL ICRA CIVIL ACTION TO DETERMINE WHETHER THE *DRY CREEK LODGE* EXCEPTION CONFERS AN "ESCAPE ROUTE' VIA FEDERAL JURISDICTION.

The Tenth Circuit decision in this case represents an unnecessary limitation on the use of the *Dry Creek Lodge* exception that almost *always* favors tribal immunity over the federal and tribal ICRA rights of non-Indians. This imbalance is the result of the manner that the Tenth Circuit Court of Appeals applies this "escape route" rule, a rule anchored in simple justice and fair treatment to citizens of the State of New Mexico and the United States of America. There

must be access to the federal courts in situations where a plaintiff adequately accuses a tribe in his ICRA action of depriving him of a forum to challenge his termination from tribal employment. There is no legitimate reason why the 10th Circuit Court of Appeals exception announced in *Dry Creek Lodge* should be extended and not condemned by a narrow application of the rule where circumstances cry for justice.

District courts should be reversed on appeal and directed to hear evidence supporting a non-Indian plaintiff's allegations that the tribal forum was so procedurally corrupted that the tribal forum was, in effect, not available as a place to remedy his dispute. This approach would recognize that the plaintiff has the burden of making a threshold showing in his pleadings that plainly alleges an "egregious" malignant corrupted hearing and tribal appellate proceeding that forecloses all remedies in the "tribal forums". It also safeguards any overly invasive intrusions by the district court into internal tribal matters while setting parameters for plaintiffs so they will be duly noticed of their evidentiary burdens. As it is in these circumstances, a cursory analysis with no detailed review of Officer Gallegos' allegations that access to tribal forums was blocked can only lead to a judicially created "cul-de-sac" where tribal forums will be characterized as always *fully* accessible to the aggrieved non-Indian employee.

District Courts should hear evidence supporting a non-Indian plaintiff's allegation that his firing from the tribe's police department was based upon an illegal conspiracy of co-employees, who were the subject of an "outside" federal investigation, since this does not fall exclusively within the exercise of a tribe's legitimate

self-governance interest. There is no question that major allegations made by Gallegos in his ICRA causes of action were wholly ignored or swept to the wayside in summary fashion. The District Court's characterization of Gallegos' as only expressing his "dissatisfaction" with the decisions of the tribal forum shows a disregard for the principle that the allegations are to be taken as true on motion to dismiss and all reasonable inferences are to be drawn in favor of the plaintiff. *Housing Authority of the Kaw Tribe v. City of Ponca City*, 952 F.2d 1183, 1187 (10th Cir. 1991). App. 20a.

Further, the District Court's conclusion that Gallegos' ICRA causes of action was a wrongful termination not within the *Dry Creek* exception presumes that every job held by a non-Indian on the reservation automatically concerns *only* "tribal issues". In an era of massive tribal economic activity on reservations within the jurisdiction of the 10th Circuit Court of Appeal, this view is simply not reality. The phenomena of gambling on Indian reservations Nationwide has created a variety of jobs broad ranging in their impact on both federal and state regulatory concerns. Officer Gallegos' duties on the JAN Reservation included a broad variety of law enforcement responsibilities not only tribal but also federal and state in scope. Where sexual assault of tribal juveniles by JAN PD officers and where immigrants are robbed while under detention by the JAN PD, the situation takes on federal and international human rights dimensions. App. at 48a - 50a. It is certainly not proper for the lower courts to engage in a glancing review and analysis of a plaintiff's ICRA claims and condemn his appeal as "frivolous".

Failure by the district court to engage in an extensive analysis of the complaint insures that the competing but equally significant interest established in *Santa Clara Pueblo v. Martinez* and *Dry Creek Lodge* will never be reconciled. A valuable "escape route" to a federal court ICRA remedy will always be denied to loyal non-Indian employees like Officer Gallegos.

Officer Gallegos screamed in his federal ICRA action that procedural error or irregularity within the "tribal forums" denied him a fundamental right to due process and equal protection under the law but these cries were downgraded or flatly ignored by both the district court and the Tenth Circuit Court of Appeals. In the face of these plain factual allegations, the lower and appellate courts bent over backwards and in favor of tribal sovereignty to rule that Gallegos had not met the second and third prongs of the *Dry Creek Lodge* exception. As a consequence, non-Indian employees rights to fundamental due process and equal protection are "fair game" and open to abuse by tribes no matter if the employee pleads a plethora of egregious actions by the tribe toward him and those allegations are ridiculed by the tribe as "frivolous" on motion to dismiss.

III. WHETHER A TRIBE CAN ACCUSE A NON-INDIAN EMPLOYEE OF CRIMINAL BEHAVIOR CONSTITUTING FEDERAL FELONIES AND FIRE HIM ON THAT BASIS IF IT COULD NOT MAINTAIN JURISDICTION TO PROSECUTE HIM IN ITS OWN TRIBAL FORUMS FOR THOSE SAME CRIMINAL ALLEGATIONS UNDER *OLIPHANT*.

The Tenth Circuit labeled Gallegos' lawyer's references to *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) as "bizarre" and a "grave mischaracterization" of Gallegos' firing by the JAN as an exercise of criminal jurisdiction. App. 13a-14a.

It is no great task to identify various elements directly related to the commission of federal felonies within the fact pattern alleged by Officer Gallegos in his ICRA complaint. In the face of abounding allegations in Gallegos' complaint that his firing was based on his commission of federal crimes, the Tenth Circuit commented: "Rather, he first references facts not alleged in the Complaint, which is impermissible on a motion to dismiss." App. 13a.

"Indeed, the Court in *Duro* relied on *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), which held that tribes could not enforce their criminal laws against non-Indians." *U.S. v. Lara*, 541 U.S. ___ (2004) (Justice Thomas concurring by separate opinion at 8). Similarly, the Major Crimes Act, 18 U.S.C. § 1153, would also prohibit the JAN from prosecuting Officer Gallegos for committing crimes on the Reservation constituting

federal felonies like theft of firearms or embezzlement of tribal funds. Using facts pled in his ICRA complaint directly relating to crimes covered by the federal Major Crimes Act as a jumping off point, Gallegos argued in his Opening Brief, at p. 19, before the Tenth Circuit this significant matter of tribal-federal jurisdiction:

> At the heart of this issue is whether the Nation can skirt and evade *Oliphant* by allowing its employees to make vague and unspecified accusations of criminal and dishonest behavior against Gallegos and then proceed to terminate him but never give him a chance to refute the accusations with his own testimony and his own witnesses. For this significant reason, the *Dry Creek Lodge* [exception] should be applied to this case.

It cannot be doubted that Officer Gallegos and his legal counsel, Dennis G. Chappabitty, correctly raised an issue far from "bizarre" but of a national character when they argued the "*Oliphant* - lack of tribal criminal jurisdiction" issue before the Tenth Circuit. As correctly stated by Gallegos above, where a tribe openly accuses a non-Indian employee of committing federal felonies and fires him without referral to the Office of the United States Attorney for investigation and prosecution, the "egregious" element of *Dry Creek* tilts in favor of Gallegos and federal jurisdiction. No one can disagree that testimony by witnesses called against Gallegos by the JAN that he stole firearms owned by the Natio[illegible]fluenced his firing in the absence of proof in the record below that he was able to refute these false allegations at his formal

grievance hearing. A.5, ¶ 54.

Where a tribe fails to recognize that it cannot use its internal administrative personnel policies and procedures to invade the provinces wholly reserved to the United States Department of Justice, the JAN's "firing of Mr. Gallegos" becomes an illegal exercise of the Nation's "criminal jurisdiction" that must be raised in a federal ICRA civil complaint. App. 14a. Where, the District Court and the Tenth Circuit fail to recognize this blatant intrusion by the JAN *into* federal affairs that crosses the sharp "line" this Court has drawn in *Oliphant*, the question becomes one of national significance. On this point alone, this Court's must draw the line as a constitutional matter under the ICRA and grant the petition.

Finally, the JAN cannot accomplish in a tribal administrative proceeding what *Oliphant* prohibits it from doing in its own tribal forums. The magnitude of these implications alone is a compelling reason to grant the petition. The consequences of the JAN's illegal exercise of "criminal jurisdiction" masquerading as a tribal employment dispute wrecked havoc and punishment on Officer Gallegos and his family just as though he had been prosecuted by the federal government and convicted of crimes enumerated in 18 U.S.C. He was fired while his personal belonging were stolen by JAN employees and he cannot find gainful employment in his chosen profession due to the totally unjustified blemish on his outstanding record.

CONCLUSION

For these foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 02-2347

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PHILLIP GALLEGOS,
Plaintiff - Appellant,

v.

JICARILLA APACHE NATION, a federally recognized Indian tribe; CLAUDIA VIGIL-MUNOZ, STANFORD SALAZAR, TROY VICENTI, TYRON VICENTI, HERBERT MUNIZ, CARSON VICENTI, LESTER ANDRES, and RONALD JULIAN, as Tribal Council members and individually; HOYT VELARDE, DOREEN VIGIL, LEESON VELARDE, ISAAC ROYSTON, TIMOTHY ANDERSON, ESTEBAN BLANCO, LILLIAN VENENO, and TINA GOMEZ, as Tribal employees and individually,
Defendants - Appellees.

November 28, 2003, Filed

COUNSEL: For Phillip Gallegos, Plaintiff - Appellant: Hannah B. Best, Albuquerque, NM. Dennis G. Chappabitty, Sacramento, CA.

For JICARILLA APACHE NATION, a federally recognized Indian Tribe, CLAUDIA VIGIL-MUNOZ, as a Tribal Council member and individually, STANFORD SALAZAR, as a Tribal Council member and individually, TROY VICENTI, as a Tribal Council member and individually, TYRON VICENTI, as a Tribal Council member and individually, HERBERT

MUNIZ, as a Tribal Council member and individually, CARSON VICENTI, as a Tribal Council member and individually, LESTER ANDRES, as a Tribal Council member and individually, RONALD JULIAN, as a Tribal Council member and individually, HOYT VELARDE, as a Tribal employee and individually, DOREEN VIGIL, as a Tribal employee and individually, LEESON VELARDE, as a Tribal employee and individually, ISAAC ROYSTON, as a Tribal employee and individually, TIMOTHY ANDERSON, as a Tribal employee and individually, ESTEBAN BLANCO, as a Tribal employee and individually, LILLIAN VENENO, as a Tribal employee and individually, TINA GOMEZ, as a Tribal employee and individually, Defendants - Appellees: Wayne H. Bladh, Naomi Julia Barnes, Nordhaus, Haltom, Taylor, Taradash & Bladh, Santa Fe, NM.

JUDGES: Before TACHA, Chief Circuit Judge, ANDERSON, and HENRY, Circuit Judges.

OPINIONBY: Deanell Reece Tacha

OPINION: ORDER AND JUDGMENT *

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff-Appellant Phillip Gallegos brought a three-count Complaint alleging violations of the Indian Civil Rights Act, 25 U.S.C. § 1301 et seq., and 42 U.S.C. §§

1985-1986, after he was terminated from employment as a Jicarilla Apache Nation police officer. The district court granted Defendants-Appellees' motion to dismiss. We AFFIRM and GRANT, in part, Defendants-Appellees' motion for sanctions under Fed. R. App. P. 38.

I. Background

The facts, as stated in the complaint, are as follows. Mr. Gallegos, who is not a member of the Jicarilla Apache Nation ("the Nation"), worked for the Nation as a police patrol sergeant. He alleges that he uncovered evidence of possible criminal activity within the Nation's Police Department, which he reported to federal authorities. The complaint alleges that the Nation itself acquiesced in this illegal conduct. The Nation terminated Mr. Gallegos from his position as a police officer after learning of this report.

Mr. Gallegos, through counsel, administratively appealed his termination of employment to the appropriate tribal authority. After several delays, Mr. Gallegos's grievance hearing was held, in conjunction with that of a fellow "whistleblowing" member of the Nation's Police Department, who was a member of the Nation. Though the grievance panel found that the Jicarilla Apache police officer was wrongfully terminated, the panel ruled against Mr. Gallegos, after severely limiting his ability to present evidence.

Mr. Gallegos filed a three-count complaint in federal court seeking declaratory and monetary relief. In Count I, he alleges that all Defendants-Appellees, except the Nation, ("the Individual Defendants")

violated 42 U.S.C. §§ 1985-1986. In Count II, he claims that all the Defendants-Appellees breached the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1301 et seq. In Count III, he asserts that members of the Nation's Legislative Council violated the ICRA.

The district court, in a well-reasoned and thorough opinion, dismissed all three counts. The district court dismissed Counts I (as to the 42 U.S.C. § 1985(3) claim), II, and III for lack of subject matter jurisdiction. It dismissed Count I (as to the 42 U.S.C. §§ 1985(1), 1985(2), and 1986 claims) for failure to state a claim upon which relief may be granted.

Mr. Gallegos timely appealed. Prior to our decision on the merits, the Nation, in conjunction with the Individual Defendants, moved for sanctions against Mr. Gallegos's attorney for filing a frivolous appeal. We take jurisdiction under 28 U.S.C. § 1291, AFFIRM the district court's dismissal of all three counts, and GRANT, in part, the motion for sanctions.

II. Discussion

A. Standard of Review

"Rule 12(b)(1) motions generally take one of two forms." Stuart v. Colorado Interstate Gas Co., 271 F.3d 1221, 1225 (10th Cir. 2001). The moving party may (1) facially attack the complaint's allegations as to the existence of subject matter jurisdiction or (2) go beyond allegations contained in the complaint by presenting evidence to challenge the factual basis upon which subject matter jurisdiction rests. Id. We review de novo the district court's dismissal for lack of subject matter jurisdiction

pursuant to Rule 12(b)(1), and review findings of jurisdictional facts, if any, for clear error. Id.

"The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir. 1999) (internal quotations omitted). We accept all well-pleaded factual allegations in the complaint as true and view them in the light most favorable to the nonmoving party. Id. Because legal sufficiency is a question of law, we review the district court's disposition of a Rule 12(b)(6) motion de novo. Id.

B. Indian Civil Rights Act

We affirm the dismissal of the ICRA claims in Counts II and III for lack of subject matter jurisdiction. Mr. Gallegos contends that the ICRA waives tribal immunity, allowing him to bring his monetary and declaratory judgment claims. We disagree.

We start with a fundamental principle of Indian law: Indian tribes, as an aspect of their retained sovereignty, possess immunity from suit. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978). "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." Kiowa Tribe of Okla. v. Manufacturing Techs., Inc., 523 U.S. 751, 754, 140 L. Ed. 2d 981, 118 S. Ct. 1700 (1998). "Congressional waivers of tribal sovereign immunity, however, cannot be implied but

must be unequivocally expressed." Osage Tribal Council ex rel. Osage Tribe of Indians v. United States Dept. of Labor, 187 F.3d 1174, 1181 (10th Cir. 1999) (internal quotations omitted).

Congress has waived tribal immunity under the ICRA solely for habeas corpus relief. Santa Clara Pueblo, 436 U.S. at 60-61; Ordinance 59 Ass'n v. United States Dept. of Interior Sec'y, 163 F.3d 1150, 1154 (10th Cir. 1998). Federal courts, therefore, lack subject matter jurisdiction to hear claims under the ICRA against Indian tribes for declaratory relief, Ordinance 59 Ass'n, 163 F.3d at 1153, or monetary damages, Olguin v. Lucero, 87 F.3d 401, 404 (10th Cir. 1996). Further, in addition to the tribes themselves, this immunity from suit under the ICRA protects tribal officers acting in their official capacity. Santa Clara Pueblo, 436 U.S. at 71-72; Fletcher v. United States, 116 F.3d 1315, 1324 (10th Cir. 1997) ("Tribal Defendants [are] entitled to sovereign immunity as far as the official capacity claims"). n1

Mr. Gallegos urges that this weight of authority does not apply to him because he falls within the limited exception announced in Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682, 685 (10th Cir. 1980). We find this position without merit. Under Dry Creek, a plaintiff may bring a suit for damages against a tribe or tribal official under limited circumstances as an exception to Santa Clara Pueblo. Id. "Dry Creek yields a succinct test to qualify for the exception to tribal sovereign immunity. A plaintiff must demonstrate: the dispute involves a non-Indian party; a tribal forum is not available; and the dispute involves

an issue falling outside internal tribal affairs." Ordinance 59 Ass'n, 163 F.3d at 1156.

Mr. Gallegos does not satisfy this three part test. First, Mr. Gallegos had access to a tribal administrative body, and he availed himself of that forum. See Olguin, 87 F.3d at 404 (holding that plaintiff who brought ICRA claims against the tribe and tribal officers after a suspension of employment from the tribal police force did not fall within Dry Creek exception because plaintiff availed herself of a tribal forum). n2 Second, wrongful termination of tribal employment claims, such as that of Mr. Gallegos, are internal tribal affairs. See Penobscot Nation v. Fellencer, 164 F.3d 706, 713 (1st Cir. 1999), cert. denied, 527 U.S. 1022, 144 L. Ed. 2d 771, 119 S. Ct. 2367 (1999) ("We hold that the decision of the [Penobscot] Nation to terminate the employment of a [non-Indian] community health nurse was an 'internal tribal matter' within the meaning of the Settlement Act [25 U.S.C. § 1721 et seq.]."). The conclusion that tribal employment matters are internal to the tribe is bolstered when the employing tribal agency "functions as an arm of the tribal government . . . . not simply [as] a business entity that happens to be run by a tribe or its members, but, rather, occupies a role quintessentially related to self-governance." E.E.O.C. v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1080 (9th Cir. 2001). Here, Mr. Gallegos was employed as a tribal police officer, a position central to tribal self-governance.

Finally, Mr. Gallegos argues, without authority, that the Nation waived its sovereign immunity by including the relevant ICRA anti-discrimination language in its Constitution. We rejected this exact argument over a

decade ago in Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457, 1466 (10th Cir. 1989) (including ICRA anti-discrimination language in the Cherokee Nation's Constitution "no more constitutes an unequivocal expression of waiver than does the language of the ICRA, which . . . the Supreme Court refused to interpret as a waiver"). For all of these reasons, we affirm the dismissal of the ICRA claims in Counts II and III for want of subject matter jurisdiction.

C. 42 U.S.C. § 1985 and § 1986 Claims

We also affirm the dismissal of the 42 U.S.C. §§ 1985-1986 claims contained in Count I. The district court dismissed these claims against the Nation on immunity grounds. We concur with this result for substantially the same reasons presented above. See 42 U.S.C. §§ 1985-1986 (containing no express Congressional waiver of tribal immunity). Similarly, the Individual Defendants acting in their official capacities are immune from suit under §§ 1985-1986. See Fletcher, 116 F.3d at 1324. A plaintiff, however, may bring §§ 1985 and 1986 claims against individual Indian defendants acting in their non-official capacity. Id. at 1324 n.12. Nevertheless, Mr. Gallegos's claims against the Individual Defendants in their non-official capacity fail to state a claim upon which relief may be granted.

1. 42 U.S.C. § 1985(1) Individual Capacity Claim

The district court properly dismissed Mr. Gallegos's § 1985(1) claim. Mr. Gallegos argues that his termination constitutes interference with the discharging of a federal officer's duties. We disagree.

Section 1985(1) makes unlawful actions of two or more persons that prevent officers of the United States from discharging their duties. See 42 U.S.C. § 1985(1) ("If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof . . . ."). As the clear language of the statute provides, § 1985(1) only applies when federal officers are prevented from discharging their duty. See Kush v. Rutledge, 460 U.S. 719, 724-25, 75 L. Ed. 2d 413, 103 S. Ct. 1483 (1983).

Mr. Gallegos's job as a tribal police officer did not make him a federal officer. Absent cross-deputization or a similar agreement, n3 tribal police are not federal officers unless there is a "working arrangement" in which the federal officers use the tribal officers as a means of skirting a criminal defendant's procedural protections. See United States v. Leeds, 505 F.2d 161, 163 (10th Cir. 1974) (holding that tribal officer acted as a federal officer when Bureau of Indian Affairs officer had tribal officers make arrests to avoid a defendant's Fed. R. Crim. P. 5(a) right to go before a magistrate); see also United States v. Duncan, 857 F. Supp. 852, 860 (D. Utah 1994) ("Tribal police are not federal officers unless there is a working arrangement with federal officers."). Mr. Gallegos makes no such allegation. Rather, he suggests, without supporting authority, that because tribal officers enforce federal law, this transforms them into federal officers. This argument is meritless. Cf. United States v. Male Juvenile, 280 F.3d 1008, 1020 (9th Cir. 2002) (holding that United States v. Wheeler, 435 U.S. 313, 55 L. Ed. 2d 303, 98 S. Ct. 1079 (1978), requires that a tribe's power to prosecute

federal criminal law derives from the tribes inherent sovereignty -- not as an aspect of federal agency).

2. 42 U.S.C. § 1985(2) Individual Capacity Claim

In addition, the district court properly dismissed the § 1985(2) claim. Mr. Gallegos contends that the Nation fired him after his whistleblowing activities to deter him from testifying as a witness in violation of this statute. He is in error.

Section 1985(2) prohibits a conspiracy to "deter . . . a party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein . . ." 42 U.S.C. § 1985(2) (emphasis added). Although Mr. Gallegos spoke with federal officials regarding the criminal activities within the Nation's police department, there simply was no court proceeding at the time of his termination from which the Nation could deter Mr. Gallegos's participation. Thus, the Nation did not violate 42 U.S.C. § 1985(2).

3. 42 U.S.C. § 1985(3) Individual Capacity Claim

We also affirm the district court's dismissal of the § 1985(3) claim. Mr. Gallegos contends that his termination and the attendant administrative hearing violated his constitutional equal protection and due process rights, giving rise to a § 1985(3) claim. This argument is without merit.

Section 1985(3) does not create an independent cause of action. Instead, a plaintiff must "point to independent substantive rights enforceable in the federal courts" to serve as a predicate violation. Wheeler v. Swimmer,

835 F.2d 259, 261 (10th Cir. 1987). The alleged due process and equal protection violations cannot serve as predicate violations for a § 1985(3) claim because those provisions of the United States Constitution do not constrain tribes and their officials. Santa Clara Pueblo, 436 U.S. at 56-57 & n.7.

Thus, the ICRA claim provides the only remaining independent violation alleged by Mr. Gallegos that could serve as a predicate for a § 1985(3) claim. We rejected this use of an ICRA claim in Fletcher:Plaintiffs brought their claims against Defendants Charles Tillman and Geoffrey Standing Bear in their individual capacities as well. Tribal sovereign immunity does not protect an official against individual-capacity claims. However, § 1302(8) of the Indian Civil Rights Act speaks only to tribal action . . . . [Moreover], the Tribe is unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. The second amended complaint does not invoke any other civil rights statutes by name. . . . other than § 1302(8). [Thus, Plaintiffs cannot bring a § 1985(3) claim against these Defendants in their individual capacity, as they lack a predicate violation.] Fletcher, 116 F.3d at 1324 n.12 (internal quotations omitted) (citations omitted).

The reasoning of Fletcher applies here. Because Mr. Gallegos presents no viable predicate claim for his § 1985(3) claim, the district court properly dismissed it.

4. 42 U.S.C. § 1986 Individual Capacity Claim

The district court properly dismissed Mr. Gallegos's § 1986 claim. "There can be no valid claim under § 1986 of

neglect to prevent a known conspiracy, in the absence of a conspiracy under § 1985." Santistevan v. Loveridge, 732 F.2d 116, 118 (10th Cir. 1984). Because Mr. Gallegos fails to bring a viable § 1985 theory, the § 1986 claim fails as well. Id.

D. Sanctions

The Nation moved this Court, by separate motion, for an award of attorney's fees and double costs, arguing that this appeal is frivolous pursuant to Fed. R. App. P. 38 ("Rule 38") and 28 U.S.C. § 1927. The Nation seeks this award of attorney's fees and double costs only from Appellant's attorney Dennis G. Chappabitty -- not from Mr. Gallegos himself. In Mr. Chappabitty's response to the sanctions motion, he presents only one argument. He contends that the motion, as it was filed before our decision on the merits, is premature. We disagree with Mr. Chappabitty's timeliness argument, find that this appeal is frivolous pursuant to Rule 38, and hold that "just damages" in this case amount to $ 5,000.00 and double costs. n4

"To deter frivolous and abusive litigation and promote justice and judicial efficiency, the federal courts are empowered to impose monetary sanctions, by statutes and the rules of civil and appellate procedure as well as their inherent right to manage their own proceedings." Braley v. Campbell, 832 F.2d 1504, 1510 (10th Cir. 1987) (en banc). "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." Fed. R. App. R. 38.

"An appeal is frivolous when the result is obvious, or the appellant's arguments of error are wholly without merit." Id. at 1510 (internal quotations omitted). "Rule 38 . . . permits sanctions against attorneys for taking a truly frivolous appeal[,]" id. at 1511, regardless of the presence of subjective bad faith on the part of counsel, id. at 1512 ("We believe the proper standard under . . . Rule 38 . . . is that . . . [sanctions] are imposable against an attorney personally for conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court.").

An appeal may be frivolous as filed or as argued. See Finch v. Hughes Aircraft Co., 926 F.2d 1574, 1578-79 (Fed. Cir. 1991). A party may argue an appeal frivolously, for example, by "submitting rambling briefs that make no attempt to address the elements requisite to obtaining reversal, . . . failing to explain how the lower tribunal erred or to present clear or cogent arguments for overturning the decision below, . . . citation of inapplicable or irrelevant authorities, [or] misrepresenting facts or law to the court[.]" Id. at 1579 (internal citations omitted).

For many of the reasons cited by the court in Finch, we consider this appeal frivolous as argued. An example of this frivolous argumentation appears in Mr. Chappabitty's efforts to oppose the district court holding that the Dry Creek exception does not apply. Mr. Chappabitty, on appeal, does not attempt to distinguish the authority upon which the district court relied, present counter authority, or forward a serious countervailing policy argument. Rather, he first references facts not alleged in the Complaint, which is impermissible on a motion to dismiss. See Sutton, 173

F.3d at 1236. Then, he references, without citation, the Major Crimes Act, 18 U.S.C. § 1153, which governs the prosecution of enumerated crimes committed by an Indian in Indian Country. This case, of course, is a civil action brought by a non-Indian. Finally, Mr. Chappabitty cites Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 55 L. Ed. 2d 209, 98 S. Ct. 1011 (1978), in an attempt to argue that the Nation illegally exercised criminal jurisdiction over Mr. Gallegos. It is at best bizarre, and more likely, a grave mischaracterization, to characterize the Nation's firing of Mr. Gallegos as an exercise of criminal jurisdiction. Cf. Charczuk v. C.I.R., 771 F.2d 471, 475-76 (10th Cir. 1985) ("Courts are in no way obligated to tolerate arguments that thoroughly defy common sense. Such conduct is permissible in our society for the very young, those attempting to make a joke or, occasionally, philosophers, but it cannot be allowed of one engaged in the serious work of a practicing attorney appearing before a court of law.").

If a court of appeals determines that an appeal is frivolous, it must afford the relevant party due process prior to imposing sanctions. "The due process requirements fall into two categories: (1) specificity of findings, to facilitate response and review, and (2) notice and opportunity to be heard." Braley, 832 F.2d at 1513. The first prong of the due process analysis is met when an appellate court addresses the merits on appeal. Id. at 1514. As to the second prong, "if a party has already made a motion . . . that sanctions be imposed, and identified the party or counsel it wants to be sanctioned, the notice requirements are satisfied[.]" Id. at 1515. The opportunity to submit a response brief constitutes the opportunity to be heard. Id. Here,

therefore, both prongs of the due process requirements are satisfied. n5

Mr. Chappabitty contends, without relevant authority, n6 that the Nation's motion was premature because we had yet to rule on the merits. Rule 38, however, requires only that a party file a separate motion for sanctions. It is silent as to timing. Our review of case law finds no prohibition against filing a motion for sanctions prior to a decision on the merits. Cf. Hirschfeld v. New Mexico Corr. Dept., 916 F.2d 572, 581 (10th Cir. 1990) (considering a motion for sanctions that was filed prior to disposition on the merits).

The Nation, pursuant to Rule 38, requests the Court to award it $ 13,507.50 in attorney's fees and double costs in the amount of $ 126.34. The unopposed Affidavit of Wayne H. Bladh, counsel for the Nation, supports this request. We find, however, that "just damages" in this case amount to $ 5,000.00. See Fed. R. App. P. 38; Stafford v. United States, 208 F.3d 1177, 1179 (10th Cir. 2000) (awarding Rule 38 sanctions of $ 4,000.00, an amount less than full attorney's fees). n7 Therefore, we grant the Nation's motion for sanctions in the amount of $ 5,000.00 in "just damages" and $ 126.34 in double costs.

III. Conclusion

For the foregoing reasons, we AFFIRM the district court's dismissal of Mr. Gallegos's complaint, GRANT, in part, the Nation's motion for Rule 38 sanctions and ORDER sanctions imposed against Mr. Chappabitty in the amount of $ 5,126.34.

ENTERED FOR THE COURT,

Deanell Reece Tacha
Chief Circuit Judge

FOOTNOTES

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

n1 The ICRA, by its plain language, does not allow suits against individual Indians acting in a non-official capacity. See 25 U.S.C. § 1302 ("No Indian tribe in exercising powers of self-government shall . . . .") (emphasis added); see also Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 935 (10th Cir. 1975) ("Section 1302 speaks only to tribe action, and it has been held that it does not give rise to jurisdiction under 28 U.S.C. § 1343 over individual tribal members.").

n2 The fact that plaintiff in Olguin took advantage of a tribal judicial forum and that Mr. Gallegos brought his grievance in a tribal administrative forum is of no consequence. Cf. Ute Distrib. Corp. v. Ute Indian Tribe, 149 F.3d 1260, 1266 n.8 (10th Cir. 1998) (holding that, under Santa Clara Pueblo, access to a tribal forum does not require access to a tribal judicial forum); Wheeler v. United States Dept. of Interior, Bureau of Indian Affairs, 811 F.2d 549, 553 (10th Cir. 1987) (holding that a tribal administrative forum constitutes a "tribal forum . . . for resolving a tribal election dispute").

n3 Mr. Gallegos does not allege that he was cross-deputized or in some other fashion acting as a federal officer. Cf. United States v. Schrader, 10 F.3d 1345, 1350 (8th Cir. 1993) (tribal officers can act as federal officers pursuant to authorized contracts with the Department of Interior).

n4 Because we find that Rule 38 provides appropriate damages to the Nation, we do not consider sanctions pursuant to 28 U.S.C. § 1927.

n5 We reject Mr. Chappabitty's assertion that a separately filed motion for sanctions provides insufficient notice. His quote from the Rule 38 Advisory Committee Notes, which he takes out of context, lends no support to his position.

n6 Mr. Chappabitty's cite to Braley, 832 F.2d 1504 (10th Cir. 1987) (en banc), is without merit. In Braley, the court considered the propriety of sanctions issued sua sponte, and did not address the timing of motions filed by parties.

n7 We often remand to the district court for the determination of Rule 38 "just damages." See, e.g., Beilue v. International Bhd. of Teamsters, Local No. 492, 13 Fed. Appx. 810, 815 (10th Cir. 2001) (unpublished). Here, however, Mr. Chappabitty offers no protest, absent the specious timeliness argument, to the award of sanctions. As no findings of fact exist for the district court to make, we see no reason to remand. See Stafford, 208 F.3d at 1179.

Civil No. 02-1095

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PHILLIP GALLEGOS,
Plaintiff,

v.

JICARILLA APACHE NATION, a Federally Recognized Indian Tribe; CLAUDIA VIGIL-MUNOZ, as a Tribal Council Member and Individually; STANFORD SALAZAR, as a Tribal Council Member and Individually; TROY VICENTI, as a Tribal Council Member and Individually; TYRON VICENTI, as a Tribal Council Member and Individually; HERBERT MUNIZ, as Tribal Council Member and Individually; CARSON VICENTI, as a Tribal Council Member and Individually; LESTER ANDRES, as a Tribal Council Member and Individually; RONALD JULIAN, as a Tribal Council Member and Individually; HOYT VELARDE, as a Tribal Employee and Individually; DOREEN VIGIL, as a Tribal Employee and Individually; LEESON VELARDE, as a Tribal Employee and Individually; ISAAC ROYSTON, as a Tribal Employee and Individually; TIMOTHY ANDERSON, as a Tribal Employee and Individually; ESTEBAN BLANCO, Tribal Employee and Individually; LILLIAN VENENO, as a Tribal Employee and Individually; and TINA GOMEZ, as a Tribal Employee and Individually,
Defendants.

September 26, 2002

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court upon Defendants' Motion to Dismiss, filed September 26, 2002 (Doc. 21). Defendants (collectively, "JAN Defendants") contend that the Jicarilla Apache Nation ("Nation") and its officials are entitled to sovereign immunity, and that this Court does not have subject matter jurisdiction over the action. Defendants offer alternative theories for dismissal of either specific parties or specific claims: several of the named Legislative Council members must be dismissed from the suit in their official capacities because they no longer serve on the council; Plaintiff has failed to state a claim under any 42 U.S.C. § 1985 and § 1986; and service on the individual Defendants in their individual capacities was inadequate. Having reviewed the parties' submissions and the applicable law, I find that Defendants' motion is well-taken and will be granted, for reasons articulated below.

Background

Plaintiff Gallegos, who is Hispanic and not a member of the Nation, was formerly employed as a Patrol Sergeant in the Nation's Police Department. He alleges that he was wrongfully terminated as a result of his uncovering evidence of possible criminal activities within the Nation's Police Department, which were eventually reported to federal agencies.[1] Plaintiff

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[1] This conduct included "fraud, embezzlement, falsifying reports, falsifying time cards, use of excessive

contends that the Nation routinely tolerated and acquiesced to such conduct not only by failing to take necessary measures to prevent and curtail such misconduct, but by firing "whistleblowing" non-tribal members employees. Compl., ¶ 13. Plaintiff further alleges that Defendants engaged in a conspiracy to wrongfully manipulate the appeal of his wrongful termination, thus depriving him of his right to due process and equal protection of the law as a non-tribal member. Gallegos presents these claims as violations of 42 U.S.C. § 1985,42 U.S.C. § 1986. and the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341. He seeks money damages as well as declaratory relief against the JAN Defendants.

Discussion

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). In ruling on a motion to dismiss, this Court must accept the factual allegations of the complaint as true and draw all reasonable inferences in favor of the plaintiff. Housing Authority of the Kaw Tribe v. City of Ponca City, 952 F.2d 1183,1187

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force, assaults, battery under the color of authority, conspiracy to violate federal and tribal civil rights of citizens, the hiding of criminal wrongdoings of police officers from federal prosecutors when such reponing was mandatory and leaving their assigned duty posts without authorization." Compl., ¶ 52.

(10th Cir. 1991). Defendants move for dismissal under Fed.R.Civ.P. 12(b)(1) based on sovereign immunity as a jurisdictional bar to Plaintiffs claims; under Rule 12(b)(6) as to Plaintiffs claims under the Indian Civil Rights Act ("ICRA") and §§ 1985 and 1986; and under Rule 12(b)(5) for ineffective service upon the Individual Defendants in their individual capacities.

Plaintiff names numerous Defendants in this lawsuit: the Nation's President (Claudia Vigil- Muniz)[2] and seven Legislative Council members (Stanford Salazar, Troy Vicenti, Tyron Vicenti, Larson Vicenti, Herbert Muniz, Lester Andres and Ron Julian). He also asserts claims against the Executive Director of Public Safety (Hoyt Velarde); five police officers in the Nation's police department (Doreen Vigil; Leeson Velarde, Isaac Royston, Timothy Anderson and Esteban Blanco); and two employees of the Nation's Human Resources Department (Lillian Veneno and Tina Gomez). Count I in the complaint asserts claims under 42 U.S.C. § 1985-86 against all Defendants as Individuals; Count II is brought under 25 U.S.C. § 1301 et seq., against the Nation and all Defendants; and Count III asserts clairns also under 25 U.S.C. § 1301 et seq., against Defendants Hoyt Velarde, Doreen Vigil, Lillian Veneno and Tina Gomez.

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[2] The caption erroneously refers to this Defendant as a tribal council member, although she is correctly identified in the Complaint. Compl., ¶ 5. Also, Defendants point out that the correct legal name of the governing body of the Jicarilla Apache Nation is the "Legislative Council," not "Tribal Council." Deft.s Brf. at 2. The Court will therefore make the appropriate substitution where such references are relevant.

I. ICRA Claims - Counts I and II

Plaintiff's claims against the tribe may be summarily dismissed. Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. Puyallup Tribe. Inc. v. Wash Dept. of Game, 433 U.S. 165,172-73 (1977), cited in Santa Clara Pueblo v. Martinez, 436 U.S. 49,58 (1978). This sovereign immunity is maintained absent either an explicit waiver of immunity or express authorization of the suit from Congress. Ordinance 59 Association v. U.S. Dep't of the Interior Sec'y et al., 163 F.3d 1150, 153 (10th Cir. 1998) (citing Santa Clara Pueblo, 436 U.S. 49)).

Plaintiff's claims under ICRA concern Defendants' alleged conspiracy to wrongfully terminate him because he reported misconduct by tribal officials and employees, the denial of a fair grievance, and equal protection of the law as a non-tribal member. Because the sole federal relief available under ICRA against a tribe or its officers is a writ of habeas corpus, Counts I and II must be dismissed. Santa Clara Pueblo, 436 U.S. at 63. Dismissal of these claims applies to claims for declaratory and injunctive relief as well as monetary damages. Id. at 72.

A. Dry Creek Exception

Defendants are correct that the *Dry Creek Exception*[3] does not apply to this case. Although

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[3] This exception to Santa CIara which would allow a suit to proceed against a tribe in federal court requires (1) that the dispute involve a non-Indian, (2)

Plaintiff is a non-Indian, the other two *Dry Creek* requirements are not met. A tribal forum was available: Plaintiff states in his complaint that his grievance hearing was held before a three-member panel, and Plaintiff exercised his right of appeal. Plaintiff's dissatisfaction with the result does not carve out a fourth prong to the *Dry Creek* exception. White v. Pueblo of San Juan, 728 F.2d 1307, 1312 (10th Cir.1984) (seeking out of tribal remedy is not "merely a requirement that the exhaustion of tribal remedies is a prerequisite to federal jurisdiction, but instead, that tribal remedies, if existent, are exclusive"). Nor can I conclude that what is at heart a wrongful termination action does not concern tribal issues, which would bring the case within the *Dry Creek* exception. See, e.g., Penobscot Nation v. Fellencer, 164 F.3d 706 (1st Cir. 1999) (decision of tribal council to terminate employment of community health nurse who was non-Indian, was internal tribal matter); EEOC v. Karuk Tribal Housing Authority, 260 F.3d 1071 (9th Cir. 2001) (tribe immune from wrongful termination suit under ADEA);[4] accord, EEOC v. Cherokee Nation, 871 F.2d

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the matter in dispute is not intra tribal, and (3) no tribal forum for the dispute exists. Dry Creek Lodge. Inc. v. Arauahoe & Shoshone Tribes, 623 F.2d 682, 685 (10th Cir. 1980).

[4] In Karuk the court concluded that the relationship between the Housing Authority and plaintiff alleging an ADEA claim touched on "exclusive rights of self-governance in purely intramural matters." 260 F.3d at 1083 (citation omitted). Also, while the "self-governance" analysis distinguishing between "government functions" and "commercial activities

937 (10th Cir. 1989). My decision takes into account the narrow interpretation our circuit has afforded the *Dry Creek* exception. Nero et al. v. Cherokee Nation of Okla., 892 F.2d 1457,1450, n.5 (10th Cir. 1989) (recognizing exception as "requiring narrow interpretation in order to not come into conflict with the decision of the Supreme Court in Santa Clara") citing White, 728 F .2d at 1312. This cautious approach to the *Dry Creek* exception can have the result of precluding federal court jurisdiction over non-Indian complaints brought under the ICRA "even if tribal remedies are unavailable." Nero, 892F.2d 1460, n.5 (citing Ramev Const. Co. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315 (10th Cir.1982) (suggesting that the *Dry Creek* exception be applied only in cases with similar facts).

B. Individual Defendants

Further, sovereign immunity bars Plaintiff's ICRA claims whether the individual Defendants are sued in their official or individual capacities. Suits against these individuals in their official capacities operate the same as if they were brought against the tribe itself. Nero, 892 F.2d at 1462) (interest in

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undertaken by tribes" may consider the employment of non-Indians as a factor, the inquiry settles on whether the tribe is operating exclusively within the domain of the Tribe and its members, or whether the activities are commercial or related to interstate commerce. 260 F.3d at 1081. Thus, the fact that Plaintiff is a non-member does not affect this third prong of my inquiry into whether this case fits into the *Dry Creek* exception.

preserving "inherent right of self-government in Indian tribes is equally strong" when suit is brought against individual officers of the tribal organization as when brought against the tribe itself); Bruette et al. v. Knope et al., 554 F.Supp. 301, 304 (E.D.Wis. 1983) (common law immunity from suit enjoyed by Indian tribes extended to defendants who were tribal policemen which effectively shielded them in their official capacities from actions, either for injunctive or for monetary relief, brought pursuant to 25 U.S.C. § 1302). Since ICRA provides rights only against the tribe and tribal governmental subdivisions as opposed to tribal members acting in their individual capacities, Plaintiff's claims under ICRA cannot proceed against Defendants in their individual capacities. Cmp., Bruette et al. at 304 (dismissing suit brought under ICRA against tribal policemen in their individual capacities). Therefore, Counts II and III are dismissed against the Tribe and all of the individual Defendants in both their individual and official capacities.

II. Claims under 42 U.S.C. §§1985-86 (Count I)

A. Tribe and Defendants in Official Capacity

Plaintiff's claims under § 1985 and § 1986 against the tribe are dismissed on the basis of sovereign immunity, as discussed above with regard to Plaintiff's claims in Counts II and III. As to claims brought under § 1985 generally against the individual Defendants, the same common law immunity that shielded Defendants in their official capacities from suit in Plaintiff's claims brought under ICRA, also shields them from suit in the claims brought under § 1985. Means v.Wilson, 522 F.2d 833,838 (8th Cir. 1975), cited in Bruette, 554 F.Supp. at

301 (citing Santa Clara Pueblo, 436 U.S. at 59-72). Therefore, claims contained in Count I against all of the individual Defendants in their official capacities will be dismissed.

B. Individual Defendants in Individual Capacities

Claims brought under § 1985 and § 1986 against the individual Defendants in their individual capacities is another matter, as such claims are allowed against individual tribe members.[5] See Means v. Wilson, 522 F.2d at 838 (district court erred in concluding that sovereign immunity applied to suits brought under § 1985(3) against individual Indians); E.F. W. et al. v. St. Stephen's Mission Indian High School, et al., 51

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[5] Since the Nation President and seven council members clearly belong in the category of tribal officials, the analysis pertaining to jurisdiction over the Defendants in their individual capacity may be superfluous. See Bruette, 554 F.Supp. at 304. n.* (applying dismissal of tribal official to defendant who was sued in his capacity as a "tribal policeman'). With regard to the remaining Defendants who are also sued in their "individual capacity," it is not so clear how far this legal fiction extends. Seven of the "individual" Defendants are sued in their capacity as tribal policemen; Mr. Velarde is being sued in his capacity as executive director of public safety; and Ms. Veneno and Ms. Gomez are sued in their capacities as human resource employees. Nevertheless, for the sake of thoroughness, my analysis encompasses any and all Defendants who can arguably be included in the category of Defendants who can be sued in their individual capacity.

F.Supp.2d 1217, 1231 (D. Wyo. 1999) (tribal sovereign immunity does not extend to claims against individual Indians under the federal civil rights statutes for such persons sued in their individual capacity). However, their viability ends upon further inquiry into whether this court has jurisdiction over these Defendants in claims brought under § 1985 and § 1986.

C. § 1985(3)

The complaint does not clearly specify which subsection of § 1985 Defendants are alleged to have violated. Because the phrase "equal protection' appear throughout the complaint, I will construe the complaint to allege an action under § 1985(3). The provisions of 42 U.S.C. § 1985(3) provide for recovery of damages by a party who is injured as a result of a conspiracy to deprive any person of equal protection of the laws or of equal privileges and immunities under the laws.[6] However, § 1985(3) does not create an independent substantive cause of action. Wheeler v. Swimmer et al., 858 F.2d 259, 261 (10th Cir. 1987) (claims brought under § 1985(3) and § 1986 must "point to independent substantive rights enforceable in the federal courts"); Nero, 892 F. 3d at 1461 (plaintiff must allege violations of independent substantive statutory or constitutional

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[6] The essential elements of a section 1985(3) claim are: 1) a conspiracy; 2) to deprive plaintiff of equal protection or equal privileges and immunities; 3) an act in furtherance of the conspiracy committed or caused to be committed by the conspirator; and 4) an injury or deprivation resulting therefrom. Griffin v. Breckenridge, 403 U.S. 88.102-103 (1971); Tilton v. Richardson, 6 F.3d 683, 686 (10th Cir. 1993).

provisions to recover under § 1985(3) and § 1986); Montgomery et al. v. Flandreau Santee Sioux Tribe. et al., 905 F.Supp.740 (S.D.Dak. 1995)(to satisfy the requirements of § 1985(3) claim, plaintiff must allege violations of statutory or constitutional rights that the federal courts have jurisdiction to redress (citing Wheeler, 835 F.2d at 261).

As noted above, ICRA does not provide a basis for federal jurisdiction beyond habeas corpus. Wheeler, 835 F.2d at 261 (citing Santa Clara Pueblo, 436 U.S. at 63); Nero, 892 F.2d at 1462 (ICRA does not provide an independent basis for suit under §§ 1985(3) and 1986); Montgomery, 905 F.Supp. at 746 (where plaintiff could not bring claim under ICRA, § 1985(3) did not provide independent remedy based on ICRA).

Further, because the federal Constitution does not constrain either tribes or tribal officials, Plaintiff cannot get to a cause of action under § 1985(3) through the usual Fourteenth Amendment equal protection route. Means v. Wilson, 822 F.2d at 837 (§ 1985(3) claim against individual tribal members failed for lack of either constitutional source or congressional power to "reach the private conspiracy alleged in the complaint"); Trans-Canada Enternrises. Ltd.v. Muckleshoot Indian Tribe et al, 634 F.2d 474, 476, 477 (9th Cir. 1980) (constitutional guarantees are not applicable to the exercise of governmental powers by an Indian tribe except to the extent that they are made explicitly binding by the Constitution or are imposed by Congress); Dubray v. Rosebud Housing Authority, 565 F.Supp. 462, 465 (D.S.D. 1983) (United States Constitutional limitations do not apply to tribes, to tribal agencies, or to individual tribal officials) (citing

Talton v. Mayes, 163 U.S. 376 (1896); Santa Clara Pueblo, 436 U.S. at 49); Wardle v. Ute Indian Tribe et al, 623 F.2d 670 (10th Cir. 1980) (Various civil rights statutes invoked by employee who had been discharged by Indian tribe did not provide him a cause of action).[7] Accordingly, I find that this Court has no jurisdiction over Plaintiff's § 1985(3) claims against Defendants in their individual capacities.

D. § 1985(1) ["Preventing officer from perfonning duties"][8]

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[7] Although Plaintiff uses "due process" to describe the rights upon which he bases part of his claims, § 1985(3) applies only to conspiracies to deprive persons of equal protection, not to conspiracies to deny due process. Collins v. Hardyman, 341 U.S. 651 (1951), overruled on other grounds by Griffin v. Breckenridge, 403 U.S. 88, 102-103 (1971); Chafin v. Pratt, 358 F.2d 349, 356, n.10 (5th Cir. 1966); Dunn v. Gazzola, 216 F.2d 709,711 (1st Cir. 1954). I therefore give it no further consideration either as a basis for his § 1985(3) claim or as alleged under the federal Constitution.

[8] Section § 1985(1) reads as follows: "If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, *any person from accepting or holding any office, trust, or place of confidence under the United States*, or from discharging any duties thereof or to induce by like means any *officer of the United States* to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof,

I agree with Defendants that Plaintiff does not even arguably allege a claim under this subsection, although Plaintiff presents a lame effort for the first time in his response to the instant motion by contending that Defendants prevented him from carrying out his duties as a law enforcement officer in the Nation's Police Department. Plaintiff cannot state a claim under § 1985(1) because by its express language, this subsection applies only to an "officer of the United States," or "any person from accepting or holding any office, trust, or place of confidence under the United States." Plaintiff has not alleged that he belongs in either category. Cmp., e.g., Bruette, 554 F.Supp. at 304 (§ 1983 claim against tribal officer dismissed where claim did not allege that officer was delegated police powers by state rather than the tribe, or that they were attempting to enforce state rather than tribal law or otherwise offering assistance to state authorities such that their conduct could be imbued with state action).

E. *§ 1985(2)* (" Obstructing justice; intimidating party, witness. or juror")[9]

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or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties."(emphasis supplied)

[9] Section § 1985(2) reads: "If two or more persons in any State or Territory conspire to deter, by force. intimidation. or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the

Plaintiffs claim under this subsection fails for similar reasons. According to Plaintiff, his whistleblowing activities are within the purview of the activities protected by § 1985(2). He reported the misconduct of tribal officials and police officers to the Acting Chief of Police, which then allegedly resulted in a request for investigation by federal law enforcement officials. Compl., ¶¶ 14-15. However. § 1985(2) envisions a conspiracy to "deter. . . a party or witness in any court of the United States from attending such court, or from testifying to any matter *pending* therein. . . ." (emphasis supplied). Whether or not Plaintiff's efforts may, through a chain of events, turn into or may have already turned into (this is not clear from the complaint) a federal grand jury investigation concerning the allegations which sparked the investigation, is immaterial. Plaintiff was not either "attending" or "testifying to" a matter which was pending at the relevant time. See e.g., Wright v. No Skiter Inc. et al., 774 F.2d 422, 424 (10th Cir. 1985)

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verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce. the right of any person, or class of persons, to the equal protection of the laws."

("attending" a court starts from time plaintiff files complaint).

F. § 1986

Section 1986, which provides an action for neglecting to prevent a violation of Section 1985, is premised upon the existence of a valid § 1985 claim. Abercrombie v. Citvof Catoosa, Okla., 896 F.2d 1228, 1230 (10th Cir. 1990); Wright., 774 F.2d at 424. My finding that Plaintiff has not stated a cIa1rn under § 1985 necessarily dispenses with this claim as well.

III. Alternative Bases for Dismissal

Defendants seek dismissal of Ronald Julian. Tyrone Vicente, and Stanford Salazar, who held office at the time of his termination. On the day Plaintiff attempted to serve the complaint, new council members were sworn in to replace these Defendants. Since an official capacity suit is still a suit against the state. Will v. Mich. Dept. of State Police, 491 U.S. 58, 71 n.10 (1989), these three former council members cannot be sued in their official capacities because they no longer serve the Nation in their official capacities. Because my findings above dismiss all of Plaintiff's claims on other bases, I need not pass on this issue. The inadequacy of service as to the individual Defendants in their individual capacity is moot for the same reason.

THEREFORE,

IT IS ORDERED that Defendants' Motion to Dismiss (Doc. 21) is hereby GRANTED in that:

(1) this Court has no subject matter jurisdiction over Plaintiff's claims against all Defendants named in Counts II and III on the basis of sovereign immunity and for reasons described above;

(2) this Court has no subject matter jurisdiction over Plaintiff's claims brought against Defendants under § 1985(3) in Count I on the basis of sovereign immunity and for reasons described above; and

(3) Plaintiff fails to state a claim under 42 U.S.C. § 1985(1).42 U.S.C. § 1985(2) and 42 U.S.C. §1986. The findings in this Memorandum Opinion and Order dismiss all of Plaintiff's claims in this case against all Defendants in their entirety.

A Judgment in accordance with this Memorandum Opinion and Order will issue.

UNITED STATES DISTRICT JUDGE

Civil No. 02-1095
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PHILLIP GALLEGOS,
Plaintiff,

v.

JICARILLA APACHE NATION, a Federally Recognized Indian Tribe; CLAUDIA VIGIL-MUNOZ, as a Tribal Council Member and Individually; STANFORD SALAZAR, as a Tribal Council Member and Individually; TROY VICENTI, as a Tribal Council Member and Individually; TYRON VICENTI, as a Tribal Council Member and Individually; HERBERT MUNIZ, as Tribal Council Member and Individually; CARSON VICENTI, as a Tribal Council Member and Individually; LESTER ANDRES, as a Tribal Council Member and Individually; RONALD JULIAN, as a Tribal Council Member and Individually; HOYT VELARDE, as a Tribal Employee and Individually; DOREEN VIGIL, as a Tribal Employee and Individually; LEESON VELARDE, as a Tribal Employee and Individually; ISAAC ROYSTON, as a Tribal Employee and Individually; TIMOTHY ANDERSON, as a Tribal Employee and Individually; ESTEBAN BLANCO, Tribal Employee and Individually; LILLIAN VENENO, as a Tribal Employee and Individually; and TINA GOMEZ, as a Tribal Employee and Individually,
Defendants.

September 26, 2002

JUDGMENT

THIS MATTER came before the Court upon Defendants' Motion to Dismiss, filed September 26, 2002 (Doc. 21). Pursuant to the findings and conclusions set forth in the Memorandum Opinion and Order which accompanies this Rule 58 Judgment:

IT IS THEREFORE ORDERED and ADJUDGED that Defendants' Motion to Dismiss (Doc. 21) is hereby GRANTED in that:

(1) this Court has no subject matter jurisdiction over Plaintiff's claims against all Defendants named in Counts II and III on the basis of sovereign immunity and for reasons described above;

(2) this Court has no subject matter jurisdiction over Plaintiff's claims brought against Defendants under § 1985(3) in Count I on the basis of sovereign immunity and for reason described above; and

(3) Plaintiff fails to state a claim under 42 U.S.C. § 1985(1), 42 U.S.C. § 1985(2) and 42 U.S.C. § 1986. The findings in this Memorandum Opinion and Order dismiss all of Plaintiff's claims in this case against all Defendants in their entirety.[1]

UNITED STATES DISTRICT JUDGE

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[1] Plaintiff's claims which are dismissed for lack of subject matter jurisdiction are dismissed without prejudice. Other claims are dismissed with prejudice.

JICARILLA APACHE
TRIBAL CODE

TITLE 19
ADMINISTRATION

§ 5. Grievances.

(A) Formal Grievance. A formal grievance is a written complaint by an employee concerning actions taken by management which result in loss of pay or status, written or oral reprimand, denial of promotion or transfer, or a formal complaint by an applicant concerning failure to receive appointment to Tribal employment. Grievants who wish to begin a formal proceeding shall contact the Personnel Office for assistance in the preparation of written requests for hearings and appeals. Time limits given herein shall be considered as maximum and every effort shall be made to expedite the process. Grievants may have the counsel of other persons at all stages of the grievance proceeding. Refusal to appear and participate in a formal grievance proceeding shall result in forfeiture of any further right to that appeal. Tribal employees may be required to appear as witnesses in grievance hearings when requested by the aggrieved employee or by the Tribe.

(B) Procedure For Grievance Hearing. Before accepting or approving action that could result in a grievance hearing, a department or office director shall review all of the circumstances surrounding the proposed action, including a discussion with the Tribal employee who is affected. Upon acceptance of a

grievance for hearing the following steps shall be followed.

(1) Each Tribal employee who is affected by the action shall receive written notice of the action within forty-eight (48) hours.

(2) The Tribal employee affected may file a written response to a grievance to the Personnel Office within ten (10) calendar days after receiving written notice of the action which occasions the grievance.

(3) The Personnel Office shall convene a three (3) person grievance panel upon receipt of written response by the affected employee and when the grievance concerns employment with Tribal Government.

(4) The grievance panel shall be composed of two (2) members selected from a Tribal department or office or from the President's or Trial Judge's immediate staff and one (1) member selected by the President or Trial Judge from a list of three (3) nominees submitted by the grievant.

(5) The grievance panel shall convene a hearing within fifteen (15) calendar days after the filing of the written grievance, call witnesses, and make certain that all relevant information is presented clearly.

(6) The grievance panel shall make a written recommendation to the President or Trial Judge within five (5) calendar days after the hearing.

(7) Within five (5) calendar days of receiving the recommendation, the President or Trial Judge shall review and approve, disapprove or modify the recommendation and notify all parties of the decision in writing.

(8) The grievant may appeal the President's or Trial Judge's decision to the Tribal Council by writing to the Personnel Office within ten (10) calendar days of the President's or Trial Judge's decision.

(9) The Tribal Council shall convene as a grievance appeal panel at a regularly scheduled or special meeting within ten (10) calendar days.

(10) The Tribal Council at an officially convened meeting shall review all facts and information of the grievance and may hear testimony, before making a decision. The decision of the Tribal Council shall be final.

At all grievance and appeal panel hearings, the following testimony shall be permitted and shall be presented first by the grievant and then by the department: statement by the Personnel Office outlining the present status of the grievance; statements by the parties to the grievance; statements by witnesses; statements by expert witnesses; and any other testimony required by the grievance panel. Witnesses may not be present except when they are testifying. Major points to any testimony shall be presented in writing. The grievance panel or appeal panel hearing may be closed for presentation of confidential testimony, and the hearings shall be recorded and documented.

(C) Grievance Records. Records of grievance proceedings shall be maintained as confidential by the Personnel Office. The Personnel Office shall have a representative at all formal grievance proceedings, shall see that the proceedings are documented, shall provide staff assistance to all parties on request, shall advise on all procedural questions, and shall interpret the meaning of this Code in relation to the grievance.

March 17, 2001

Fax Transmittal w/Original to Follow
Lillian Veneno, Director
Human Resources Department
Jicarilla Apache Nation
P.O. Box 507
Dulce, New Mexico 87528

Re: Notice of Appeal of Panel Recommendation, dated March 7, 2001, and Decision by the President, dated March 13, 2001 to Approve of the Discharge of Grievant Phillip Gallegos and Written Response in the Matter of the Grievance.

Dear Ms. Veneno:

By decision, dated March 13, 2001, President Claudia Vigil-Muniz approved a March 7th Panel recommendation that the discharge of Mr. Gallegos be upheld and the grievance dismissed as lacking merit through the preponderance of evidence and testimony given at the hearing. The recommendation in the matter of *Phillip Gallegos v. Jicarilla Apache Nation* was by majority vote of 2 to 1.

The Jicarilla Apache Tribe Personnel Manual, Chapter 7, Section 1.(10) authorizes Mr. Gallegos to file an appeal of the President's decision to uphold the discharge in issue by submitting a written response

with the Tribal Personnel Office within 5 calendar days. This letter serves as formal Notice of Appeal of the March 7th Recommendation and the March 13th decision approving of the discharge.

In accordance with the provisions cited above, The Tribal Personnel Office shall make a written notification to the Tribal Council that they shall serve as a grievance appeal panel at a regularly scheduled or special meeting.

Further, Grievant-Appellant Gallegos provides his written response to support his appeal to the Tribal Council by citing the following errors and/or irregularities in the March 1st and 2nd consolidated hearing that caused him direct prejudice and deprived him due process to present fully present his case to the Panel:

Violation of Grievant's Right to Due Process:

At the close of the Tribal Police Department's case-in-chief to show just cause for discipline, Grievant-Appellant was deprived of his right by the Panel to show why the discharge was unfair. There is an indication that Panel members and the Hearing officer's decision to conclude the hearing prior to complete presentation of Grievant's case was affected by their

personal desire to conclude the proceeding by noon on March 2nd. Mr. Gallegos could have successfully presented his own testimony (w/favorable documentary evidence) and completed the testimony of persons on his list of witnesses who would testify in his favor by 5:00pm on that day. A finding of "lack of merit" in regards to Gallegos grievance is plain error since such a conclusion is not possible when he was kept from putting on his case before the Panel.

Had the Panel allowed him and his attorney, Dennis G. Chappabitty, time to put on his case-in-chief, it would have been more likely than not that he would have proven, by the preponderance of the evidence, that his October 2, 2000 discharge was unfair and not based on relevant and credible evidence tending to show that he was guilty of wrongdoing. Written grievance hearing procedures used at the hearing give the grievant the right to show why discipline was unfair. Grievant-Appellant Gallegos was deprived of this fundamental right.

Same Evidence, Same Results:

Both Grievance Panels heard exactly the same witnesses for both sides and both Panels reviewed the same evidence. The charges specified in the October 2nd notice of terminations for both Alan and Phil were the same. For these reasons, a decision by the Gallegos Panel to uphold the termination is in error and should be reversed by the Tribal Council.

The Employer did not follow proper disciplinary procedures:

Grievants Gallegos and Tafoya did not know the "work rule" they supposedly violated. Testimony at the hearing shows that Hoyt Velarde never communicated to either Gallegos or Tafoya the specific rules they were violating. He kept secret from Gallegos the majority of the details that were allegedly the reason for the charges listed in the October 2nd notice of termination. Testimony that Gallegos would have produced had he been allowed put his case on would show that he did not understand the rule or expectation that Hoyt Velarde claims was violated in his October 2nd notice. Velarde never explained any problem to Gallegos but encouraged other police officers with bad attitudes toward Gallegos to make unsupported claims, unsubstantiated allegations and other accusations against him based on mere hearsay and rumor.

Testimony shows that Velarde never conducted a fair and neutral investigation of facts prior to imposing discipline in the form of immediate termination. Gallegos would have testified that Velarde did not interview any officers except those with bad attitudes toward him and that he never interviewed Gallegos but laid out a trap to cause the basis for the October 2nd firing. Velarde even signed an outstanding evaluation prepared by Alan Tafoya of Gallegos on June 14, 2000. Velarde admitted that he had never discussed with Gallegos and Tafoya the supposed problems with them that he had identified in his May 26, 2000 draft "Action Plan".

We believe that had Gallegos been able to put on his case, he would have firmly convinced the Panel that procedures were not followed during the termination process.

Letter to Lillian Veneno, Director, JAPN Human Resources Office
Re: Notice of Appeal and Written Response
March 17, 2001
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48 Hour Rule Violation:

Hoyt Velarde refers to the Human Resources Office as possessing the documentary backup to support his October 2nd firings of Tafoya and Gallegos.

Had Gallegos been able to testify he would swear that he tried on October 2nd to get the supporting documents from the Human Resources Office but they told him they did not have the information. The Police Department and the Human Resources Department failed to give Gallegos the required specific information to allow him to defend against his firing.

The Personnel Manual requires that the employee must be given a written notice signed by the Tribal President **within forty-eight (48) hours** specifying the effective date of the termination, charge, the specific behavior and the dates (where appropriate) that supports the charge. Testimony at the hearing proves that Hoyt Velarde, the Human Resources Department and the President never complied with giving this information to Gallegos within the time required. This deprived him of due process and put him and his attorney at a severe disadvantage since the Human Resources Personnel repeatedly surprised them with documents they had never seen even up to the day of the hearing! This fundamentally unfair.

Further, the Hearing Panels and the Hearing Officer's refusal to restrict the testimony and evidence to information outside of the "48 hour rule" opens up the door to abuses similar to the one here where the grievant is continually surprised with new evidence of questionable origin up and until the day of the hearing.

If the Tribal Council allows this, then there is no need to even have a grievance procedure available for disciplined tribal employees.

The Police Department produced no credible evidence to prove wrongdoing:

Testimony shows that Hoyt Velarde did not produce one credible shred of evidence or testimony that Gallegos had: 1) wilfully neglected to perform his duties,2) disregarded the Personnel Manual as well as departmental policies and regulations, 3) violated reasonable or official orders, refused to carry out lawful/reasonable directions given by his immediate supervisor or engaged in other acts of insubordination, 4) engaged in criminal, dishonest or other conduct which interfered with his effective job performance or had an adverse effect on the efficiency of the Jicarilla Apache Nation service, or 5) disregarded or violated the Tribal Laws or Ordinances of the Jicarilla Apache Nation. Hoyt Velarde's October 2nd termination specified these charges and the President approved of Gallegos termination although the record contained no specific dates, times, witnesses, etc. to support the unproven charges.

Had Gallegos had been given his right to put on his case-in-chief, he would have produced credible testimony and evidence on his behalf that those

employees in the Police Department who were complaining about his behavior were employees who were continually late to work, illegally "moonlighting", lying on investigative reports or engaging in other unprofessional, unethical or illegal behavior. Gallegos reported these lazy and indolent police officers to his supervisor and wrote these complaints out in the form of sworn incident reports.

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Re: Notice of Appeal and Written Response
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Gallegos would have proven his firing was retailatory:

The fact that the Grievance Panel cut the hearing short deprived Gallegos of his right to show that Hoyt Velarde's October 2nd firing of him was retaliatory. Acting Chief Tafoya and Sgt. Gallegos were very concerned about credible indications that Hoyt Velarde and other police officers, including Leeson Velarde, were participating in numerous violations of departmental procedure and possibly engaging in criminal activity.

Gallegos hearing strategy would have shown that he had a duty to file incident reports on other

officers for engaging in questionable, unethical or unlawful behavior. As a consequence of Gallegos executing his duty to the Apache People to protect their welfare and safety, he can produce credible evidence showing that Hoyt Velarde had openly encouraged, secretly met and conspired with other police officers loyal to him over a period of several months to produce false testimony and bogus grounds to fire him.

In his opening statement on March 1st, Dennis G. Chappabitty promised that Gallegos would produce admissible and credible evidence and testimony that both he and Acting Chief Tafoya were reporting indications of internal departmental corruption to the FBI, BIA and taking other corrective action against a group of officers loyal to Hoyt Velarde. Gallegos would have shown that he, the Acting Chief and other officers were reporting possible corruption:

1) indications of unlawful sex by police officers with juvenile Apache females;

2) indications of use of drugs at parties held at police officer's homes on the reservation;

3) indications of hiding or destroying records of convictions of domestic violence

involving officers loyal to Hoyt Velarde;

4) indications of Hoyt Velarde's favoritism of certain police officers like Doreen Vigil, Leeson Velarde, Issac Royston and Tim Anderson to a point where they were able to circumvent departmental procedures;

5) indications of physical abuse by favored police officers of arrested Apaches;

6) indications of intimidation of police officers reporting incidents of bad behavior committed by Hoyt's "untouchables" and covering up of incident reports when Velarde's relations (daughter) were the subject of suspected criminal activity;

7) indications of the persistence of outside "double" employment by Leeson Velarde and Issac Royston held by the BIA as "criminal conduct" which jeopardized the physical safety of other police officers when they failed to respond or delayed their response to calls for backup;

Letter to Lillian Veneno, Director, JAPN Human Resources Office

8) indications that Hoyt Velarde converted funds derived from the forfeiture sale of confiscated vehicles to his own personal use;

9) indications that Hoyt Velarde supported Tim Anderson, a loyal follower, although the BIA agreed with Sgt. Gallegos that Anderson had engaged in an act of swearing falsely on a police incident report;

10) indications that Hoyt Velarde demanded details from officers on outside or internal investigations that may have implicated himself or his loyal officers;

11) indications of theft of personal items, money and other property by police officers from the persons and vehicles of illegal immigrants stopped on the reservation;

12) indications that Hoyt Velarde and other of his loyal officers created a bogus and false basis to accuse Tafoya and Gallegos

of being unprepared for the 2000 Little Beaver Celebration when this was not the case;

13) indications that Hoyt Velarde and the Human Resources Department were working together to make sure that Gallegos and Tafoya would not have access to the specific information supposedly supporting the October 2nd charges;

14) indications that Hoyt Velarde was creating divisiveness based on racial lines among police officers to form groups against Gallegos and Tafoya and in favor of him and his loyal officers;

15) indications that Hoyt Velarde was defrauding the State of New Mexico out of funds by listing himself as eligible to receive a commission from the state when he was not so qualified; and

16) indications that Hoyt Velarde began interfering with Tafoya and Gallegos in the execution of their job duties during Raleigh Tafoya's illness and subsequent death

For the reasons stated above, the Tribal Council should immediately reverse the Gallegos Grievance Panel's March 2nd decision upholding termination and the March 13th President's concurrence in the Panel's recommendation or allow Gallegos to present his side of the story at a full hearing before the Council. Mr. Gallegos reserves the right to supplement this notice and written response after he reviews the transcript of the March 1st and 2nd proceeding.

Dennis G. Chappabitty
On behalf of Phillip Gallegos

(2)

FILED
MAY 2 3 2004
CLERK OF THE COURT

No. 03-1479

In the Supreme Court of the United States

PHILLIP GALLEGOS,

Petitioner,

v.

JICARILLA APACHE NATION, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Tenth Circuit properly affirmed the United States District Court for the District of New Mexico's dismissal of Petitioner's complaint for relief under the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (2001) (ICRA) against the Jicarilla Apache Nation under the governing case law of this Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

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STATEMENT OF THE CASE

I. Procedural Background

Petitioner Phillip Gallegos (Petitioner) filed his Complaint against the Jicarilla Apache Nation (Nation) and individual officials and employees of the Nation (JAN Defendants) on August 30, 2002 in the United States District Court for the District of New Mexico (District Court). In his Complaint, Plaintiff alleged violations of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341 (2001) (ICRA), and violations of 42 U.S.C. §§ 1985 and 1986 (2000). Petitioner's Appendix to Petition for Writ of Certiorari at 2a–3a (Petitioner's Appendix). In his Complaint, Plaintiff sought money damages (punitive, general and special), declaratory relief, costs and attorney fees against the JAN Defendants for alleged violations of 42 U.S.C. §§ 1985 and 1986, and the ICRA. Petitioner's Appendix at 20a. Plaintiff alleged that the JAN Defendants violated the referenced statutes when Plaintiff was terminated from his position as a police officer for the Nation. Petitioner's Appendix at 19a-20a.

On September 26, 2002, the JAN Defendants filed a Motion to Dismiss Plaintiff's Complaint based on the following: (1) the District Court lacked subject matter jurisdiction over the claims due to the Nation's and the Individual Defendants' sovereign immunity; (2) Petitioner failed to state a claim upon which relief could be granted; and, (3) Petitioner failed to properly serve some of the JAN Defendants. Fed. R. Civ. P. 12(b)(1), 12(b)(6) & 12(b)(5); Petitioner's Appendix at 19a. The District Court granted the Motion to Dismiss and entered judgment against Petitioner on

November 18, 2002. Petitioner's Appendix at 19a, 34a[1]. Petitioner erroneously filed a Notice of Appeal in the United States Court of Appeals for the Ninth Circuit on December 17, 2002. His appeal was transferred by that Court to the United States Court of Appeals for the Tenth Circuit (Tenth Circuit). On November 28, 2003, the Tenth Circuit, in an unpublished Order and Judgment, affirmed the District Court's dismissal of Petitioner's case and imposed sanctions on Petitioner's attorney under Fed. R. App. P. 38 for frivolously arguing Petitioner's appeal. Petitioner's Appendix at 12a-15a.

In his Petition for Writ of Certiorari, Petitioner seeks review by this Court of only the dismissal of his claims brought under the ICRA. Petition at i (Questions Presented). Petitioner has therefore abandoned any attempt to have his claims brought under 42 U.S.C. §§ 1985 and 1986 reviewed by this Court. Sup. Ct. R. 14.1(a). Petitioner has likewise abandoned any challenge to the portion of the Order and Judgment imposing sanctions against Petitioner's attorney.

II. The District Court's Dismissal of Petitioner's ICRA Claims

The District Court dismissed Petitioner's ICRA claims based upon this Court's *Santa Clara Pueblo* opinion. Petitioner's Appendix at 22a. Relying on *Santa Clara Pueblo*, the District Court held that ICRA did not waive the

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[1] Pages 19a and 34a of Petitioner's Appendix imply that the date of the District Court's Memorandum Opinion and Order and its Judgment was September 26, 2002. That date is actually the date that the Nation filed its motion to dismiss Petitioner's complaint. The District Court issued its Memorandum Opinion and Order and its Judgment on November 18, 2002.

Nation's sovereign immunity for claims for declaratory, injunctive or monetary relief. *Id.* The District Court also rejected Petitioner's claim that the Tenth Circuit's narrowly interpreted opinion *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), which created an exception to this Court's *Santa Clara Pueblo* opinion, applied to this case. Petitioner's Appendix at 22a-24a.

III. The Tenth Circuit's Affirmance of the District Court's Dismissal

The Tenth Circuit affirmed the District Court's dismissal. In so doing, the Court reaffirmed that under *Santa Clara Pueblo*, the ICRA did not waive the Nation's sovereign immunity from suit for Petitioner's claims. *Id.* at 6a. The Court properly recognized the fact that "[f]ederal courts . . . lack subject matter jurisdiction to hear claims under the ICRA against Indian tribes for declaratory relief or monetary damages." *Id.* (citation omitted). In addition, the Tenth Circuit, construing its own *Dry Creek* opinion, held that the *Dry Creek* exception to *Santa Clara Pueblo* did not apply to Petitioner's claims because Petitioner had access to a tribal administrative body and his wrongful termination claims involved internal tribal affairs. *Id.* at 7a. The Tenth Circuit also summarily rejected Petitioner's argument that the Nation's constitution waived the Nation's sovereign immunity under the ICRA. *Id.* at 7a-8a.

Finally, the Tenth Circuit sanctioned Mr. Chappabitty, Petitioner's attorney, five thousand dollars under Fed. R. App. P. 38 for frivolously arguing Petitioner's appeal before the Tenth Circuit. *Id.* at 12a-15a. In particular, the Court admonished Mr. Chappabitty regarding his attempt to claim that Petitioner's civil lawsuit somehow implicated restrictions

on the Nation's criminal jurisdiction. *Id.* at 14a. In that regard, the Court stated: "It is at best bizarre, and more likely, a grave mischaracterization, to characterize the Nation's firing of [Petitioner] as an exercise of criminal jurisdiction." *Id.* Despite these sanctions, Mr. Chappabitty has again raised the issue of the scope and nature of the Nation's criminal jurisdiction as it relates to Petitioner's termination from tribal employment. Petition at 27-29.

IV. Facts

Petitioner was employed by the Nation as a police officer until he was terminated. Petitioner's Appendix at 3a (Tenth Circuit opinion); 19a (District Court opinion). Petitioner alleged in his complaint that he was terminated because he reported alleged misconduct by other police officers to federal agencies. *Id.* After he was terminated, Petitioner initiated the Nation's grievance procedure to protest his termination and a grievance hearing was held. *Id.* at 3a; 23a. Petitioner's grievance hearing and another police officer's grievance hearing were heard at the same time. *Id.* at 3a. The other police officer, who is a member of the Nation, was reinstated. *Id.* Petitioner, however, was not reinstated and the grievance panel limited his ability to present evidence at the hearing. *Id.* After the hearing, Petitioner appealed the grievance panel's decision to the Nation's Legislative Council in accordance with the Nation's code. *Id.* at 23a ("Plaintiff states in his complaint that his grievance hearing was held before a three-member panel, and Plaintiff exercised his right of appeal."); 38a.

The Petitioner's statement of the facts of this case are based upon the Complaint which was included in the appendix for Petitioner's appeal to the Tenth Circuit. Petition at 5 n.2. However, Petitioner did not include his Complaint in the

Appendix to his Petition for Writ of Certiorari. The JAN Defendants assert that the necessary and relevant facts as alleged in the Complaint are adequately described in the opinions of the District Court and the Tenth Circuit. Petitioner's Appendix at 3a-4a, 19a-23a. To the extent Petitioner now alleges facts different from the facts alleged in the Complaint and described in those opinions, the JAN Defendants deny the accuracy and relevance of such facts.

ARGUMENT

I. Reasons for Denying the Writ

Petitioner has failed to present this Court with any basis upon which to grant a writ of certiorari. Petitioner's main argument for granting the writ seems to be that this Court must require the lower federal courts to expand the scope of the Tenth Circuit's *Dry Creek* exception to this Court's opinion in *Santa Clara Pueblo*. Petition at 15. By focusing on the Tenth Circuit's *Dry Creek* decision (which the Tenth Circuit itself has never followed in the twenty-four years since it was decided), Petitioner ignores the holding of this Court in *Santa Clara Pueblo*. Petitioner's arguments assume that federal courts have the power to waive an Indian tribe's sovereign immunity without an unequivocal expression of such waiver by Congress or the tribe itself, based on a judicial balancing of interests. Petition at 18 ("[T]he circuit court has jeopardized the implementation of the only viable exception or 'escape route' from the traditional sovereign immunity bar from suits against Indian tribes in federal courts."). However, this Court has already considered the scope of Congress' waiver of tribal sovereign immunity in ICRA and has held that the ICRA is enforceable against Indian tribes in federal court only by writ of habeas corpus. *Santa Clara Pueblo*, 436 U.S. at 71; *see also Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."); 25 U.S.C. § 1303 (2001).

The plain language of the ICRA and this Court's interpretation of that language in *Santa Clara Pueblo* unmistakably preclude Petitioner's ICRA claims against the Nation. This Court's decision in *Santa Clara Pueblo* provides

clear authority upon which to deny Petitioner's writ.

Petitioner's sole basis for finding a waiver of the Nation's sovereign immunity is his proposed extension of the Tenth Circuit's 1980 opinion in *Dry Creek*. Petition at 13. The *Dry Creek* opinion created an exception to this Court's holding in Santa Clara Pueblo for cases that meet the following elements: (1) the dispute at issue involves a non-Indian; (2) a tribal forum is not available; and, (3) the dispute at issue does not involve internal tribal affairs. *Dry Creek*, 623 F.2d at 685. This Court has never adopted the holding of *Dry Creek*, and the Tenth Circuit has never followed it. *Ordinance 59 Ass'n v. United States Dept. of the Interior*, 163 F.3d 1150, 1158-1159 (1998) ("With the exception of *Dry Creek* itself, we have never found federal jurisdiction based on the *Dry Creek* exception.").

Even if this Court were willing to recognize the Tenth Circuit's decision in *Dry Creek* as a legitimate exception to *Santa Clara Pueblo*, the Tenth Circuit has determined the *Dry Creek* elements do not apply to Petitioner's claims under the ICRA. As the Tenth Circuit itself explained regarding Petitioner's claims:

> Mr. Gallegos does not satisfy this three part test. First, Mr. Gallegos had access to a tribal administrative body, and he availed himself of that forum. Second, wrongful termination of tribal employment claims, such as that of Mr. Gallegos, are internal tribal affairs. The conclusion that tribal employment matters are internal to the tribe is bolstered when the employing tribal agency "functions as an arm of the tribal government . . . not simply [as] a business entity that happens to be run by a tribe or its members, but, rather, occupies a role

> quintessentially related to self-governance." Here, Mr. Gallegos was employed as a tribal police officer, a position central to tribal self-governance.

Petitioner's Appendix at 7a (citations omitted). Since the Tenth Circuit itself has determined that its *Dry Creek* opinion does not apply to this case, the Petition does not present an appropriate vehicle for this Court to decide whether *Dry Creek* is even good law.

As to the elements of the *Dry Creek* exception and the requirement that a tribal forum be available for the non-Indian party, there can be no doubt that the tribal administrative process was sufficient. Petitioner had access to an elaborate grievance process. Indeed, Petitioner himself admits that the Nation's administrative process is comprehensive and "provides an understandable step-by step procedure for handling employment disputes." Petition at 9. The fact that the grievance procedure is an administrative process does not affect the conclusion that Petitioner had a tribal forum available. In fact, this Court acknowledged in *Santa Clara Pueblo* that non-judicial tribunals adequately provide tribal remedies. *Santa Clara Pueblo*, 436 U.S. at 66 ("Nonjudicial tribal institutions have also been recognized as competent law-applying bodies.").

And further, despite Petitioner's extensive arguments that his employment dispute was an external matter that brings his ICRA claims within the Tenth Circuit's *Dry Creek* exception, he cannot avoid the fact that his employment with the Nation was a matter of internal tribal affairs. Petitioner's Appendix at 7a (Tenth Circuit's analysis of the nature of the dispute); *see also Penobscot Nation v. Fellencer*, 164 F.3d 706, 713 (1st Cir. 1999) ("[W]e hold that the decision of the Nation to terminate the employment of a community health nurse [who

was a non-Indian] was an 'internal tribal matter' within the meaning of the Settlement Act."). As explained above, the Tenth Circuit concluded that direct employment by an Indian tribe presumptively involves internal tribal affairs. Petitioner's Appendix at 7a.

Petitioner's attempt to make the termination of his employment a federal matter is not supported by the cases he cites. Petition at 18-26. For instance, Petitioner cites *Haddle v. Garrison*, 525 U.S. 121 (1998) for the proposition that his employment and termination were federal in nature. Petition at 21. However, in *Haddle*, the plaintiff brought claims under 42 U.S.C. § 1985(2) claiming that he was discharged as a result of a conspiracy to retaliate against him for responding to a grand jury subpoena and agreeing to testify in a criminal trial. *Haddle*, 525 U.S. at 123. *Haddle* does not address the ICRA or tribal employment matters. Therefore, *Haddle* provides no authority for Petitioner's contention that his employment and termination were federal matters that bring this case within the *Dry Creek* exception.

Petitioner finally argues that *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) precluded the Nation from terminating Petitioner's employment based on conduct that the Nation has no criminal jurisdiction to prosecute. Petition at 27-29. This argument is so insubstantial and spurious it provided part of the basis for the Tenth Circuit's imposition of sanctions upon Mr. Chappabitty. Petitioner's Appendix at 14a. Petitioner has not challenged those sanctions, but continues to press this spurious reading of *Oliphant*. *Oliphant* in no way supports Petitioner's claim that his termination involves federal matters or federal interests.

II. The Petition Fails to Demonstrate Any Compelling Reasons to Grant the Writ

Petitioner has failed to demonstrate that any of the factors listed in Sup. Ct. R. 10 apply to this case to support the granting of the writ. Rule 10 provides three reasons, the general character of which are designed to inform litigants of the nature of the issues appropriate for certiorari review: (1) a conflict among the United States Circuit Courts of Appeals regarding an important matter of federal law; (2) the highest court of a state has decided an important issue of federal law; or (3) a state court or a United States Court of Appeals has decided an important issue of federal law that should be settled by this Court. None of these basic guidelines is fulfilled by Petitioner's Petition. Petitioner has not shown a split among the Circuits, nor has he demonstrated that this Court must settle an important issue of federal law. Indeed, as discussed above, this Court has already settled the issue of law presented by this case in *Santa Clara Pueblo*. Therefore, this Court should not grant the writ.

CONCLUSION

The Writ of Certiorari should be denied because the Petition provides no basis for granting the Writ.

Respectfully submitted:

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